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**STATE OF MINNESOTA
BOARD OF ARCHITECTURE, ENGINEERING,
LAND SURVEYING, LANDSCAPE ARCHITECTURE, GEOSCIENCE
AND INTERIOR DESIGN**

**In the matter of
Earl F. McKinney**

STIPULATION AND ORDER

Board File No. 2004-0020

TO: Earl F. McKinney
3171 West Roxburg Drive
Lexington KY 40503

The Minnesota Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience and Interior Design ("Board") is authorized pursuant to Minn. Stat. §§ 214.10 and 326.111 to review complaints against architects, engineers, land surveyors, landscape architects, geoscientists, and certified interior designers, and to take disciplinary action whenever appropriate.

The Board received information concerning Earl F. McKinney ("Respondent"). The Board's Complaint Committee ("Committee") reviewed the information. The parties have agreed that the matter may now be resolved by this Stipulation and Order.

STIPULATION

IT IS HEREBY AGREED by and between Respondent and the Committee as follows:

1. Jurisdiction. The Respondent has held a license to practice professional engineering from the Board since October 6, 1977. Respondent is subject to the jurisdiction of the Board with respect to the matters referred to in this Stipulation.
2. Facts. This Stipulation is based upon the following facts:
 - a. Respondent was first licensed to practice professional engineering

in the State of Minnesota on October 6, 1977.

b. The Commonwealth of Kentucky revoked Respondent's license to practice engineering on July 11, 2002. A true and correct copy of the Final Order of the Kentucky State Board of Licensure for Professional Engineers and Land Surveyors, entered on July 16, 2002, is attached as Exhibit A and incorporated herein by reference. The Final Order was affirmed on appeal and the Supreme Court of Kentucky denied discretionary review on November 16, 2005.

c. The State of Nevada, Board of Registered Professional Engineers and Land Surveyors, issued an Amended Decision and Order on July 18, 1997 taking disciplinary action against Respondent's license to practice mechanical engineering. A true and correct copy of the Amended Decision and Order is attached as Exhibit B and incorporated herein by reference.

d. The State of Nevada, Board of Registered Professional Engineers and Land Surveyors, issued a Decision and Order on March 29, 1991 taking disciplinary action against Respondent's license to practice mechanical engineering. A true and correct copy of the Decision and Order is attached as Exhibit C and incorporated herein by reference.

e. The South Carolina Department of Labor, Licensing and Regulation, Board of Registration for Professional Engineers and Land Surveyors, issued a Consent Order on May 27, 1997 taking disciplinary action against Respondent's professional engineering license. A true and correct copy of the Consent Order is attached as Exhibit D and incorporated herein by reference.

f. The North Carolina Board of Examiners for Engineers and Surveyors issued a Consent Order on December 3, 1999 taking disciplinary action against Respondent's engineering license. A true and correct copy of the Consent Order is attached as Exhibit E and incorporated herein by reference.

g. The State of Hawaii, Board of Professional Engineers, Architects, Surveyors and Landscape Architects, Department of Commerce and Consumer Affairs, entered into a Settlement Agreement with Respondent on March 9, 2000 which took disciplinary action against Respondent's professional engineering license. A true and correct copy of the Settlement Agreement is attached as Exhibit F and incorporated herein by reference.

h. The State of Colorado, Board of Registration for Professional Engineers and Professional Land Surveyors, issued Letters of Admonition dated March 14, 2001 and November 19, 2002 to Respondent. True and correct copies of the Letters of Admonition are attached as Exhibit G and incorporated herein by reference.

i. The State of Florida, Board of Professional Engineers entered in a Settlement Stipulation with Respondent, approved on May 12, 2003, which took disciplinary action against Respondent's professional engineering license. True and correct copies of the Settlement Stipulation and Final Order Approving Settlement Stipulation are attached as Exhibit H and incorporated herein by reference.

j. The Texas Board of Professional Engineers entered a Final Order on December 20, 1989, which took disciplinary action against Respondent's registration as a professional engineer. A true and correct copy of the Final Order is attached as Exhibit I and incorporated herein by reference.

k. The Texas Board of Professional Engineers issued an Agreed Board Order on September 5, 2002, which took disciplinary action against Respondent's registration as a professional engineer. A true and correct copy of the Agreed Board Order is attached as Exhibit J and incorporated herein by reference.

l. The Texas Board of Professional Engineers issued a Consent Order on October 9, 2003, which took disciplinary action against Respondent's registration as a professional engineer. A true and correct copy of the Consent Order is attached as Exhibit K and incorporated herein by reference.

m. The Louisiana Professional Engineering and Land Surveying Board issued a Consent Order on April 2, 2004, which took disciplinary action against Respondent's license as a professional engineer. A true and correct copy of the Consent Order is attached as Exhibit L and incorporated herein by reference.

n. The Vermont Board of Professional Engineering issued a Default Order on March 2, 2006, which revoked Respondent's license as a professional engineer. A true and correct copy of the Default Order and Specification of Charges is attached as Exhibit M and incorporated herein by reference.

o. The Tennessee State Board of Architectural and Engineering Examiners issued a Final Order on September 19, 2003, which took disciplinary action against Respondent's registration as an engineer, based on a Consent Order signed by Respondent. A true and correct copy of the Final Order and Consent Order is attached as Exhibit N and incorporated herein by reference.

p. The Arizona State Board of Technical Registration issued Findings of Fact, Conclusions of Law, and Order on June 6, 2000, which took disciplinary action

against Respondent's mechanical engineering license and electrical engineering license. A true and correct copy of the Findings of Fact, Conclusions of Law, and Order is attached as Exhibit O and incorporated herein by reference.

3. Violations. Respondent admits that the facts specified above constitute violations of Minn. Stat. §§ 326.111, subd. 4(a)(1), (2), (3), and (6); and Minn. R. 1805.0100, subp. 3; 1805.0200, subp. 1; 1805.0200, subp. 4 (C, D); and 1805.0700, and are sufficient grounds for the action specified below.

4. Enforcement Action. Respondent and the Committee agree that the Board should issue an Order in accordance with the following terms:

a. Revocation of License. Respondent's license to practice professional engineering shall be revoked as of the date of the Board's Order approving and adopting this Stipulation.

b. Surrender License. Respondent shall immediately surrender his professional engineering license and wall certificate to the Board by delivering the originals thereof to the Board office at:

Board of Architecture, Engineering,
Land Surveying, Landscape Architecture, Geoscience
and Interior Design
Suite 160
85 East Seventh Place
St. Paul, MN 55101

c. Prohibitions. Respondent hereby agrees:

(i) Not to undertake any activities in the State of Minnesota requiring licensure under Minn. Stat. §§ 326.02-326.15;

(ii) Not to hold himself out as a professional engineer in the State of Minnesota; and

(iii) Not to reapply for licensure as a professional engineer in the State of Minnesota at a future date.

5. Waiver of Respondent's Rights. For the purposes of this Stipulation, Respondent waives all procedures and proceedings before the Board to which Respondent may be entitled under the Minnesota and United States constitutions, statutes, or the rules of the Board, including the right to dispute the allegations against Respondent and to dispute the appropriateness of discipline in a contested case proceeding pursuant to Minn. Stat. ch. 14. Respondent agrees that upon application of the Committee without notice to or an appearance by Respondent, the Board may issue an Order containing the enforcement action specified in paragraph 4 herein. Respondent waives the right to any judicial review of the Order by appeal, writ of certiorari, or otherwise.

6. Board Rejection of Stipulation and Order. In the event the Board in its discretion does not approve this Stipulation and Order or a lesser remedy than specified herein, this Stipulation and Order shall be null and void and shall not be used for any purpose by either party hereto. If this Stipulation is not approved and a contested case proceeding is initiated pursuant to Minn. Stat. ch. 14, Respondent agrees not to object to the Board's initiation of the proceedings and hearing the case on the basis that the Board has become disqualified due to its review and consideration of this Stipulation and the record.

7. Unrelated Violations. This settlement shall not in any way or manner limit or affect the authority of the Board to proceed against Respondent by initiating a contested case hearing or by other appropriate means on the basis of any act, conduct,

or admission of Respondent justifying disciplinary action which occurred before or after the date of this Stipulation and Order and which is not directly related to the specific facts and circumstances set forth herein.

8. Record. The Stipulation, related investigative reports, and other documents shall constitute the entire record of the proceedings herein upon which the Order is based. The investigative reports, other documents, or summaries thereof may be filed with the Board with this Stipulation.

9. Data Classification. Under the Minnesota Government Data Practices Act, this Stipulation and Order is classified as public data upon its issuance by the Board. Minn. Stat. § 13.41, subd. (4) (2004). All documents in the record shall maintain the data classification to which they are entitled under the Minnesota Government Data Practices Act, Minn. Stat. ch. 13. They shall not, to the extent they are not already public documents, become public merely because they are referenced herein. A summary of this Order will appear in the Board's newsletter. A summary will also be sent to the national discipline data bank for Respondent's profession.

10. Entire Agreement. Respondent has read, understood, and agreed to this Stipulation and is freely and voluntarily signing it. The Stipulation contains the entire agreement between the parties hereto relating to the allegations referenced herein. Respondent is not relying on any other agreement or representations of any kind, verbal or otherwise.

11. Counsel. Respondent is aware that he may choose to be represented by legal counsel in this matter. Respondent was represented by Peter L. Ostermiller.

12. Service. If approved by the Board, a copy of this Stipulation and Order

shall be served personally or by first class mail on Respondent. The Order shall be effective and deemed issued when it is signed by the Chair of the Board.

RESPONDENT

Earl F. McKinney
Earl F. McKinney

Dated: 5/22/06, 2006

COMPLAINT COMMITTEE

By: Billie Lawton
Billie Lawton, Public Member
Committee Chair

Dated: 6-15, 2006

ORDER

Upon consideration of the foregoing Stipulation and based upon all the files, records and proceedings herein, all terms of the Stipulation are approved and adopted and hereby issued as an Order of this Board this 15th day of JUNE, 2006.

MINNESOTA BOARD OF
ARCHITECTURE, ENGINEERING,
LAND SURVEYING, LANDSCAPE
ARCHITECTURE, GEOSCIENCE AND
INTERIOR DESIGN

By: Harvey A. Harvala
Harvey Harvala, PE
Board Chair

EARL F. McKINNEY
PE #5580

RECEIVED
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ADMINISTRATIVE ACTION
No. 98-KBELS-0163

INDEX

1. 3/24/98 Board Administrative Complaint against Mr. McKinney
2. 2/15/99 Amended Complaint against McKinney
3. 11/5/01 The Board of Licensure began a three-day hearing regarding Mr. McKinney's engineering practice. This hearing resulted in the attached report from the hearing officer.
4. 7/11/02 The Board of Licensure accepted the hearing officer's recommendations except for the penalty portion. An order was issued revoking Mr. McKinney's license to practice engineering.
5. 9/16/03 Mr. McKinney the appealed the Board's action to the Franklin Circuit Court. On this date, Judge Crittenden issued his order affirming the Board's action.

Mr. McKinney then filed an appeal with the Kentucky Court of Appeals. I am uncertain of the date of his filing with that body.
6. 12/30/03 McKinney is denied emergency relief from the Board's revocation of his license.
7. 1/29/04 McKinney is denied intermediate relief from the Board's revocation of his license.
8. 4/22/05 The Court of Appeals affirms the Board's decision to revoke McKinney's license.
9. 6/24/05 The Court of Appeals denies McKinney's petition for rehearing.
10. 7/25/05 McKinney files motion for discretionary review with the Kentucky Supreme Court.
11. 8/30/05 The KY Board files its response to the motion for discretionary review.
12. 11/16/05 The Kentucky Supreme Court denies McKinney's request for review.

EXHIBIT A

COMMONWEALTH OF KENTUCKY

**KENTUCKY STATE BOARD OF REGISTRATION
FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS**

ADMINISTRATIVE ACTION NO. 98-KBELS- 0163

KENTUCKY STATE BOARD OF REGISTRATION FOR
PROFESSIONAL ENGINEERS AND LAND SURVEYORS

PETITIONER

VS:

COMPLAINT

EARL F. McKINNEY, PE #5580

RESPONDENT

Comes Larry S. Perkins, Executive Director of the Kentucky State Board of Registration for Professional Engineers and Land Surveyors, and being first duly sworn states as follows:

1. That Respondent, Earl F. McKinney, is registered as a Professional Engineer by the Board as a mechanical engineer, being assigned Registration Number 5580.

2. That Respondent, acting individually or on behalf of A&E Designers, Inc., a Delaware Corporation, which holds Kentucky Engineering Registration Number 611, has violated KRS Chapter 322 and administrative regulations adopted by this Board, as follows:

A. Has failed to conduct his practice in order to protect the public health, safety and welfare; has issued public statements in other than an objective and truthful manner; has solicited or accepted engineering work other than on the basis of his or his firm's or associates qualifications for the work offered; has performed services outside of his area of competence; has affixed his seal and signature to engineering plans dealing with subject matter in which he lacks competence by virtue of education or

experience; and has committed conduct likely to discredit or reflect unfavorably upon the dignity or honor of the profession, in that he has certified plans involving structural engineering, a branch in which he is not competent and qualified, in violation of KRS 322.180(4) and 201 KAR 18:140(1)(2)(4)(6)(7)(9).

B. Has failed to conduct his practice in order to protect the public health, safety and welfare; has affixed his signature and seal to engineering plans that were not prepared by him or under his direct supervisory control, and has committed conduct likely to discredit or reflect unfavorably upon the dignity and honor of the profession, in violation of KRS 322.180(4) and 201 KAR 18:140(1)(7)(9), in that he has signed and sealed numerous engineering plans in 1993, 1994, 1995 and 1996, for clients including, but not limited to: Brooks Fashions, Recordtown, Natural Wonders, Lone Star Steakhouse, Outback Steakhouse, Sonic Drive-Ins, Perkins Restaurant, Target, Rally, Wendys, International House of Pancakes, Frank and Stein, Zales, Amazing Grace Lutheran Church, Repp Ltd., Arby's, super 8 Motel, Foot Locker, Gantos, Taco Bell, Pic-N-Pay, Warner Brothers, Eddie Bauer, USPS, Advance Auto Parts, Holiday Inn Express, U-Haul, Sleep Inn, Long John Silvers, Radio Shack, McDonald's, Chief Auto Parts, Lady Luck Casino, Jiffy Lube, Best Western, Pizza Hut, Hooters, Omaha Steak, University of Pittsburgh, Denny's, Kimko's, Food Lion, GTE, Kenny Rogers, Family Dollar Store, Fuddruckers, Auto Zone, Contel, Petco, Thrift Drug, CVS Drug Store and Ramada Inn.

✓ C. Has issued public statements in other than an objective and truthful manner in violation of KRS 322.188(4) and 201 KAR 18:140(2), in that while testifying before the Nevada Board of Register Professional Engineers and Land Surveyors on January 17, 1997, in Reno, Nevada, in a disciplinary action the Respondent testified falsely.

D. Has knowingly associated with a person engaging in illegal and dishonest activities in violation of KRS 322.180(4) and 201 KAR 18:140(5) in that he applied his seal and signature to plans for the Amazing Grace Evangelical Lutheran

Church in Florence, Kentucky, knowing said plans had been prepared by David Patterson, an individual who is not licensed to practice either architecture or engineering in the Commonwealth of Kentucky.

E. Has failed to conduct his practice in order to protect the public health, safety and welfare; has applied his seal and signature to plans that were not prepared by him or under his direct supervisory control; has issued public statements in other than an objective and truthful manner; and has committed conduct likely to discredit or reflect unfavorably upon the dignity or honor of the profession; all in violations of KRS 322.180(4) and 201 KAR 18:140(1)(2)(7) (9) in that he has applied his seal and signature to blank vellums and blank blue line sheets.

F. Has failed to conduct his practice in order to protect the public health, safety and welfare; has issued public statements in other than an objective and truthful manner; and has committed conduct likely to discredit or reflect unfavorably upon the dignity or honor of the profession in violation of KRS 322.180(4) and 201 KAR 18:140(1)(2)(9), in that he has intentionally, on numerous occasions, applied his signature across his engineering seal in such a manner as to intentionally obliterate the identification of his profession and/or the branch of the profession in which he is licensed, with the intent to mislead the public.

G. Has failed to conduct his practice in order to protect the public health, safety and welfare; has issued public statements in other than an objective and truthful manner; and has committed conduct likely to discredit or reflect unfavorably upon the dignity or honor of the profession, in violation of KRS 322.180(4) and 201 KAR 18:140(1)(2)(9) in that the Respondent has accepted engineering plans prepared by others and not under his direct supervisory control and applied to those plans a sticky back title block creating the impression that the plans had been prepared by A&E Designers, Inc.

H. Has failed to conduct his practice in order to protect the public health, safety and welfare; has made public statements in other than an objective and

truthful manner; and committed conduct likely to discredit or reflect unfavorably upon the dignity and honor of the profession, in violation of KRS 322.1280(4) and 201 KAR 18:140(1)(2)(9), in that Respondent has signed and sealed engineering plans which he knew to be incomplete, and transmitted the same to permitting officials, knowing the same would be rejected due to the fact that they were incomplete, all in order to bill a client who was obligated to pay a fee at the time plans were submitted for approval.

I. Has failed to conduct his practice in order to protect the public health, safety and welfare; has made public statements in other than an objective and truthful manner; and committed conduct likely to discredit to reflect unfavorably upon the dignity and honor of the profession, in violation of KRS 322.1280(4) and 201 KAR 18:140(1)(2)(9) in that Respondent has signed affidavits of site inspections when he had not, in fact, performed a site inspection.

WHEREFORE, Petitioner demands that the license of the Respondent to practice engineering in the Commonwealth of Kentucky be revoked.

B. R. SALYER, GENERAL COUNSEL
KENTUCKY STATE BOARD OF REGISTRATION FOR
PROFESSIONAL ENGINEERS & LAND SURVEYORS
322 North Wilson, Morehead, Kentucky 40351-1260
Telephone: 606\784-8934 \ FAX 606\784-8709

ATTORNEY FOR PETITIONER

~~Frankfort, Kentucky~~ 40601

COUNTY OF FRANKLIN

be true to the best of his knowledge and belief, this the 24th day of March, 1998.

My Commission Expires:

1/17/99

NOTARY PUBLIC, KENTUCKY AT LARGE

COMMONWEALTH OF KENTUCKY
KENTUCKY STATE BOARD OF LICENSURE
FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS
ADMINISTRATIVE ACTION NO. 98-KBELS-0163

KENTUCKY STATE BOARD OF LICENSURE FOR
PROFESSIONAL ENGINEERS AND LAND SURVEYORS PETITIONER

VS. AMENDED COMPLAINT

EARL F. McKINNEY, PE #5580 RESPONDENT

Comes the Petitioner and amends the complaint to read as follows:

1. That Respondent, Earl F. McKinney, is registered as a Professional Engineer by the Board as a mechanical engineer, being assigned Registration Number 5580.
2. That Respondent, acting individually or on behalf of A & E Designers, Inc., a Delaware Corporation, which holds Kentucky Engineering Registration Number 611, has violated KRS Chapter 322 and administrative regulations adopted by this Board, as follows:

- A. Has failed to conduct his practice in order to protect the public health, safety, and welfare; has issued public statements in other than an objective and truthful manner; had solicited or accepted engineering work other than on the basis of his or his firm's or associates' qualifications for the work offered; has performed services outside his area of competence; has affixed his seal and signature to engineering plans dealing with subject matter in which he lacks competence by virtue of education or experience; has committed misconduct in the practice of engineering; and has committed conduct likely to discredit or reflect unfavorably upon the dignity or honor of the profession, in that he has certified plans involving structural engineering, civil engineering, electrical engineering, architecture and land surveying, professions and disciplines in which he is not competent and qualified, in violation of KRS 322.180(2)(4) and 201 KAR 18:140(1)(2)(6)(7)(9).
- B. Has failed to conduct his practice in order to protect the public health, safety, and welfare; has affixed his signature and seal to engineering plans that were not prepared by him or under his direct supervisory control, has committed conduct likely to discredit or reflect unfavorably upon the dignity and honor of the profession, and committed misconduct in the practice of engineering in violation of KRS 322.180(2)(4) and 201 KAR 18:140(1)(7)(9), in that he has signed and sealed numerous engineering plans in 1993,

1994, 1995, and 1996, for clients including, but not limited to: Brooks Fashions, Recordtown, Natural Wonders, Lone Star Steakhouse, Outback Steakhouse, Sonic Drive-Ins, Perkins Restaurant, Target, Rally's, Wendy's, International House of Pancakes, Frank and Stein, Zales, Amazing Grace Lutheran Church, Repp, Ltd., Arby's, Super 7 Motel, Fool Locker, Gantos, Taco Bell, Pic-N-Pay, Warner Brothers, Eddie Bauer, USPS, Advance Auto Parts, Holiday Inn Express, U-Haul, Sleep Inn, Long John Silver's, Radio Shack, McDonald's, Chief Auto Parts, Lady Luck Casino, Jiffy Lube, Best Western, Pizza Hut, Hooters, Omaha Steak, University of Pittsburgh, Denny's Kinko's, Food Lion, GTE, Kenny Rogers, Family Dollar Store, Fuddrucker's, Auto Zone, Contel Cellular, Petco, Thrift Drug, CVS Drug Store, and Ramada Inn.

- C. Has issued public statements in other than an objective and truthful manner and committed misconduct in the practice of engineering in violation of KRS 322.180(2)(4) and 201 KAR 18:140(2), in that while testifying before the Nevada Board of Registered Professional Engineers and Land Surveyors on January 17, 1997, in Reno, Nevada, in a disciplinary action, the Respondent testified falsely.
- D. Has knowingly associated with a person engaging in illegal and dishonest activities and committed misconduct in the practice of

engineering in violation of KRS 322.180(2)(4) and 201 KAR 18:140(5) in that he applied his seal and signature to plans for the Amazing Grace Evangelical Lutheran Church in Florence, Kentucky, knowing said plans had been prepared by David Patterson, an individual who is not licensed to practice either architecture or engineering in the Commonwealth of Kentucky.

E. Has failed to conduct his practice in order to protect the public health, safety, and welfare; has applied his seal and signature to plans that were not prepared by him or under his direct supervisory control; has issued public statements in other than an objective and truthful manner; has committed conduct likely to discredit or reflect unfavorably upon the dignity or honor of the profession; and committed misconduct in the practice of engineering in violation of KRS 322.180(2)(4) and 201 KAR 18:140(1)(2)(7)(9) in that he has applied his seal and signature to blank vellums and blank blue line sheets on which engineering plans were printed in his absence.

F. Has failed to conduct his practice in order to protect the public health, safety, and welfare; has issued public statements in other than an objective and truthful manner; has committed conduct likely to discredit or reflect unfavorably upon the dignity or honor of the profession; and committed misconduct in the practice of engineering in violation of KRS 322.180(2)(4) and 201 KAR

18:140(1)(2)(9) in that he has intentionally applied his signature across his engineering seal in such a manner as to obliterate the identification of his profession and/or the branch of the profession in which he is licensed, with the intent to mislead the public.

- G. Has failed to conduct his practice in order to protect the public health, safety, and welfare; has issued public statements in other than an objective and truthful manner; has committed conduct likely to discredit or reflect unfavorably upon the dignity of honor of the profession, and committed misconduct in the practice of engineering in violation of KRS 322.180(2)(4) and 201 KAR 18:140(1)(2)(9) in that Respondent has accepted engineering plans prepared by others not under his direct supervisory control and applied to those plans a sticky back title block creating the impression that the plans has been prepared by A & E Designers, Inc. or Respondent
- H. Has failed to conduct his practice in order to protect the public health, safety, and welfare; has made public statements in other than an objective and truthful manner; committed conduct likely to discredit or reflect unfavorably upon the dignity and honor of the profession, and committed misconduct in the practice of engineering in violation of KRS 322.180(2)(4) and 201 KAR 18:140(1)(2)(9), in that Respondent has signed and sealed engineering plans which he knew to be incomplete, and transmitted

the same to permitting officials, knowing the same would be rejected due to the fact that they were incomplete, all in order to bill a client who was obligated to pay a fee at the time plans were submitted for approval.

- I. Has failed to conduct his practice in order to protect the public health, safety, and welfare; has made public statements in other than an objective and truthful manner; committed conduct likely to discredit or reflect unfavorably upon the dignity and honor of the profession, and committed misconduct in the practice of engineering in violation of KRS 322.1280(2)(4) and 201 KAR 18:140(1)(2)(9) in that Respondent has signed affidavits of site inspections when he had not, in fact, performed a site inspection.
- J. Has made public statements in other than an objective and truthful manner; committed conduct likely to discredit or reflect unfavorably upon the dignity and honor of the profession; and committed misconduct in the practice of engineering, in violation of KRS 322.180(2)(4) and 201 KAR 18:140(2)(9) in that in submittals to the NCEES and in applications for licensing as an electrical engineer in Arizona and Massachusetts and as a plumbing engineer in Massachusetts, Respondent falsely stated that he had never had his license suspended by any state, had never been publicly reprimanded by any state, and was not then under investigation by any state, when, in fact, he had been publicly

reprimanded by several states, had had his license suspended by several states and was then under investigation of this Board.

K. Has failed to conduct his practice in order to protect the public health, safety and welfare; has issued public statements in other than an objective and truthful manner; committed conduct likely to discredit or reflect unfavorably upon the dignity and honor of the profession; and committed misconduct in the practice of engineering in violation of KRS 322.180(2)(4) and 201 KRS 18:140(1)(2)(9) in that not being licensed as an electrical engineer, civil engineer, architect, or structural engineer in Arizona, California, Nevada or Louisiana, Respondent applied his mechanical engineer's seal to electrical, structural and civil engineering plans and architectural plans.

L. That Respondent has failed to conduct his practice in order to protect the public health, safety and welfare; has committed conduct likely to discredit or reflect unfavorably upon the dignity and honor of the profession and has committed misconduct in the practice of engineering in that he has practiced architecture other than incidental to the practice of engineering, in violation of KRS 322.180(2)(4), KRS 322.370, and 201 KAR 18:140(1)(9).

WHEREFORE, Petitioner demands that the license of the Respondent to practice engineering in the Commonwealth of Kentucky be revoked.

B.R. SALYER, GENERAL COUNSEL
KENTUCKY STATE BOARD OF LICENSURE FOR
PROFESSIONAL ENGINEERS & LAND SURVEYORS
Kentucky Engineering Center
160 Democrat Drive, Frankfort, KY 40601
Telephone: 502\573-2680 \ FAX: 502\573-6687



ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I certify that the above amended complaint has been served on the Hon. Nancy Yelton, Hearing Officer, Division of Administrative hearings, Office of the Attorney General, 1024 Capitol Center Drive, Frankfort, KY, 40601; Hon. Robert L. Abell, P.O. Box 983, Lexington, KY, 40588; Hon Peter L. Ostermiller, 500 Kentucky Home Life Building, 239 South Fifth Street, Louisville, KY, 40202; and Robert Fentress, Assistant Executive Director, Kentucky Engineering Center, 160 Democrat Drive, Frankfort, KY, 40601, by mailing true copies to the same this the 15th day of February, 1999.



B. R. Salyer
Attorney for the Petitioner

COMMONWEALTH OF KENTUCKY
KENTUCKY STATE BOARD OF LICENSURE
FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS
ADMINISTRATIVE ACTION NO. 98-KBELS-0163

KENTUCKY STATE BOARD OF
LICENSURE FOR PROFESSIONAL
ENGINEERS AND LAND SURVEYORS

vs.

EARL F. McKINNEY, PE #5580

COMPLAINANT

RESPONDENT

* * * * *
FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER
* * * * *

May 3, 2002

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**COMMONWEALTH OF KENTUCKY
KENTUCKY STATE BOARD OF LICENSURE
FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS
ADMINISTRATIVE ACTION NO. 98-KBELS-0163**

KENTUCKY STATE BOARD OF
LICENSURE FOR PROFESSIONAL
ENGINEERS AND LAND SURVEYORS¹

COMPLAINANT

vs.

EARL F. McKINNEY, PE #5580

RESPONDENT

* * * * *
**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER**
* * * * *

This matter came on for hearing on November 5, 6, and 7, 2001, in Frankfort, Kentucky. The Complainant, the Kentucky State Board of Licensure for Professional Engineers and Land Surveyors, was represented by attorney B. R. Salyer. The Respondent, Earl F. McKinney, was present at the hearing and was represented by attorneys Peter L. Ostermiller and Robert L. Abell.

The issue in this case is whether the Kentucky State Board of Licensure for Professional Engineers and Land Surveyors may take disciplinary action against the Respondent, Earl F. McKinney, pursuant to KRS 322.180. After considering all of the evidence presented in this case, the Hearing Officer recommends that the Kentucky State Board of Licensure for Professional Engineers and Land Surveyors find Mr. McKinney

¹Prior to 1999, and at the time that this action was commenced, the Complainant's name was the Kentucky State Board of Registration for Professional Engineers and Land Surveyors. The Board's name was changed pursuant to KRS 322.010 (effective January 1, 1999) to the Kentucky State Board of Licensure for Professional Engineers and Land Surveyors. The Hearing Officer has changed the Board's name in the caption of this case to reflect the statutory change in the Board's name.

guilty of violating KRS 322.180 and that the Board suspend Mr. McKinney's engineering license for a period of five (5) years, with special conditions regarding reinstatement, as described in more detail in Section IV below.

The Hearing Officer's specific findings of fact, conclusions of law, and recommended order are set forth in detail below.

I. The Evidence on the Record of this Case

Pursuant to KRS 13B.090(1), "findings of fact shall be based exclusively on the evidence on the record."

The evidence on the record of this case consists of: (1) the testimony of witnesses who testified at the hearing in this matter, or whose prior testimony was admitted into evidence at the hearing in this matter; and (2) the exhibits that were admitted into evidence at the hearing in this matter.

The Complainant called 3 witnesses to testify:

1. Bob Wooton [Tr., Vol. I, pp. 22-156; Vol. II, pp. 1-95]
2. Robert Fentress [Tr., Vol. II, pp. 96-112]
3. Earl F. McKinney [Tr., Vol. III, pp. 5-115]

The Respondent called 2 witnesses to testify:

1. Tony Smith [Tr., Vol. IV, pp. 30-122]
2. Earl F. McKinney [Tr., Vol. V, pp. 1-192]

One Joint Exhibit was admitted into evidence. Twenty-one (21) Complainant's Exhibits were admitted into evidence. Twenty (20) Respondent's Exhibits were admitted into evidence. Those exhibits were appropriately marked and admitted into evidence

and are part of the court reporter's record in this case.

Mr. McKinney has filed a Motion to Exclude certain of these exhibits from the record of this case. The Hearing Officer has denied that Motion by separate Order. The Hearing Officer's Order is incorporated herein and, for the Board's easy reference, is attached hereto as Attachment 1.

II. Findings of Fact

A. The Parties

1. The Complainant, the Kentucky State Board of Licensure for Professional Engineers and Land Surveyors ("Board"), is charged, among other things, with the responsibility to administer the law concerning the licensure of professional engineers in the Commonwealth of Kentucky. [KRS 322.290] Prior to 1999, and at the time relevant to the matters raised in this proceeding, the Board was named the Kentucky State Board of Registration for Professional Engineers and Land Surveyors, and professional engineers were registered rather than licensed by the Board.

2. The Respondent, Earl F. McKinney, is registered or licensed as a professional engineer in the 48 contiguous states, as well as in Hawaii, the District of Columbia, and Puerto Rico. [Tr., Vol. III, p. 13]

3. Mr. McKinney has been registered or licensed as a professional engineer in the Commonwealth of Kentucky since April 21, 1964. [Tr., Vol. V, p. 155; Compl. Ex. 16, Tab 31] He was registered as a professional engineer in the Commonwealth of Kentucky at all times relevant to this matter.

4. Mr. McKinney is President of a company called A & E Designers, Inc.,

which was formed in 1990. He has been President of that company since 1999. Prior to being President of the company, he was the company's Chief Consultant. In both positions, Mr. McKinney has been in charge of the operation of the company. [Tr., Vol. V, pp. 12, 156; Resp. Ex. 5]

5. Although 98% or 99% of Mr. McKinney's work as a professional engineer at A & E Designers, Inc., is done on projects that are located outside of the Commonwealth of Kentucky [Tr., Vol. V, p. 101], the main office of A & E Designers, Inc., is located in Lexington, Kentucky.

B. Summary of Charges

6. The Board has charged Mr. McKinney with numerous violations of statutory and regulatory provisions. These charges fit into two categories: (1) allegations of making untruthful statements connected with practice as a professional engineer; and (2) allegations of signing and sealing plans inappropriately. The Hearing Officer has organized these charges as follows:

- Category 1: Allegations of Making Untruthful Statements Connected with Practice as a Professional Engineer
 - Charge 1: Assertions in NCEES Record
 - Charge 2: Statements Regarding States in which Registered as an Electrical Engineer
 - Charge 3: Statements Regarding the Extent of Practice in Nevada
 - Charge 4: Statements Regarding the Number of Engineers on Staff
- Category 2: Allegations of Signing and Sealing Plans Inappropriately

- Charge 5: Signing and Sealing Engineering Plans Without Review
- Charge 6: Signing Blank Vellum and Blue-Line Sheets
- Charge 7: Inappropriate Use of Logo
- Charge 8: Signing and Sealing Incomplete Plans for Holiday Inn Express
- Charge 9: Applying Engineering Seal to Survey Plat

[Statement of Facts and Charges, ¶¶ A, C, E, F, H, I, and J]²

C. Category 1 of Charges: Allegations of Making Untruthful Statements Connected with Practice as a Professional Engineer

7. Charges 1, 2, 3, and 4 deal with allegations that Mr. McKinney has made untruthful statements connected with his practice as a professional engineer. The Hearing Officer will address each of the charges in turn.

C.1. Charge 1: Assertions in NCEES Record

8. Charge 1 is that Mr. McKinney made untruthful assertions in the annual renewals of his National Counsel of Examiners for Engineering and Surveying (NCEES) record: (a) for 1988 and 1989, by indicating that he was not presently then under investigation by any state, when he was under investigation by the state of Texas; and (b) for 1990, 1991, 1994, and later years, by indicating that his license had not been

²These are all of the charges that currently are pending against Mr. McKinney. Other charges originally brought by the Board against Mr. McKinney have been voluntarily dismissed by the Board. Those charges that have been voluntarily dismissed by the Board are found in ¶¶ B, D, and G in the Statement of Facts and Charges.

The Hearing Officer notes that evidence was presented, and argument has been made, regarding certain matters that are not included in these charges. The Hearing Officer is addressing only the matters that are included in or related to these charges; the Hearing Officer deems all other matters irrelevant and therefore is not addressing them here.

suspended or revoked by a state and that he had not been publicly reprimanded by a state, when in fact his license had been suspended and he had been publicly reprimanded. [Statement of Facts and Charges, ¶ E]

9. The Hearing Officer will address each part of this charge in turn. First, however, the Hearing Officer will describe the NCEES record and the former disciplinary actions taken against Mr. McKinney that are relevant to these charges.

C.1.a. Background: NCEES Record

10. The National Counsel of Examiners for Engineering and Surveying (NCEES) has established a program by which an engineer can complete an NCEES record regarding the engineer's background, experience, and references. This record is then made available to state boards of engineering when the engineer authorizes transmittal of the record to the state boards. The NCEES record simplifies the process that an engineer must follow in applying for a license in more than one state. [Tr., Vol. II, pp. 102-103; Vol. III, p. 47; Vol. V, pp. 185-188]

11. An engineer who wishes to use the NCEES record completes an annual renewal form for the record. [Tr., Vol. III, p. 49]

12. Mr. McKinney completed NCEES annual renewal forms in at least 1988, 1989, 1990, 1991, 1994, 1995, 1996, 1997, and 1998. On these forms, Mr. McKinney answered questions regarding whether he was presently under investigation by a state and whether his license had been suspended or revoked by any state. [Compl. Exs. 16, 18]

13. Mr. McKinney's NCEES record was used in his applications for licenses in

California (1995-96 and 1998) and Massachusetts (1994). [Compl Exs. 16, 18]

C.1.b. Background: Former Disciplinary Actions Against Mr. McKinney

14. Mr. McKinney has been the subject of disciplinary actions in several states. The Hearing Officer will describe the various disciplinary actions that are relevant to these charges.

C.1.b.i. Texas (12-20-89)

15. On July 29, 1988, the Texas Board of Registration for Professional Engineers brought charges against Mr. McKinney regarding alleged violations of certain Board rules. The case was heard on July 12-13, 1989. The Hearing Examiner's Proposal for Decision was issued on July 21, 1989. On December 20, 1989, the Board issued its Final Order. [Compl. Ex. 17]

16. In its Final Order, the Texas Board of Registration for Professional Engineers disciplined Mr. McKinney for conduct that included the following:

- a. Placing his seal on drawings containing civil and structural engineering when he was not proficient in civil and structural engineering;
- b. Allowing his seal to appear on a survey although Mr. McKinney is not a licensed surveyor;
- c. Erroneously sealing and stamping outside his discipline on two occasions with respect to surveys and once with respect to architecture, claiming that the erroneous stamping was accidental;
- d. Allowing his seal to be used by others in sealing prototypical designs;
- e. Allowing his partner to seal and rubber stamp plans with Mr.

McKinney's engineer seal and signature replica;

- f. Allowing his seal and signature stamp to be in the custody and control of his partner, who is not a professional engineer;
- g. Using a signature stamp on plans rather than wet signing the plans because he did not know that he was required to personally sign the plans;
- h. Signing and sealing all documents prepared by firm whether each line on sheet is used under direct supervision or not;
- i. Representing to the Board in a letter that he had Texas licensed engineers on his staff who were proficient in civil and structural engineering, and that he had a qualified soils investigation analyst on his staff, but, during his testimony, not remembering who those staff members were and not wanting time to determine the answer.

[Compl. Ex. 17]

17. In its Final Order, the Texas Board of Registration for Professional Engineers determined that Mr. McKinney violated 7 rules of the Board, including the following 3 rules:

- a. Rule 3.1(ii): "The engineer shall not . . . affix his signature or seal to any engineering plan or document dealing with subject matter on which he is not qualified by education or experience to form a dependable judgment."
- b. Rule 6.1(IX): "The engineer shall not . . . perform any acts, allow any omissions or make any assertions or representations which are fraudulent, deceitful or misleading, or which in any manner whatsoever tend to create a misleading impression."

c. Rule 131.151(7)(B)(ii): An engineer shall not "engage in any conduct that discredits or tends to discredit the profession of engineering."

[Compl. Ex. 17]

18. The Texas Board of Registration for Professional Engineers disciplined Mr. McKinney for these violations by suspending his engineering registration for a period of 3 years, the suspension to be probated for a term of 3 years, "on condition that any violations of the Engineering Practice Act which have been found in this contested case, if committed again during the above term of years and subsequent to the rendition of a final order in this cause, will be grounds for a revocation of probation, at which time Respondent's license may be fully suspended, and the Respondent be prohibited from practicing Engineering in this State for the full period initially assessed." [Comp. Ex. 17]

C.1.b.ii. Disciplinary Actions in Other States as a Result of Texas Action

19. Several other states took disciplinary action against Mr. McKinney because of the disciplinary action that had been taken against Mr. McKinney by the Texas Board of Registration for Professional Engineers: Colorado, New York, Nevada, Wisconsin, Louisiana, and Delaware. The Hearing Officer will discuss each of the states in turn.

20. **Colorado (12-31-90)**: The Colorado State Board of Registration for Professional Engineers and Professional Land Surveyors found that, at various times between 1981 and 1988 in Texas, Mr. McKinney signed and sealed certain documents despite the fact that the work stamped was not done under Mr. McKinney's complete direction and control and/or was outside the scope of Mr. McKinney's competence; such conduct would provide grounds for disciplinary action against Mr. McKinney pursuant to

Colorado law. The Colorado Board admonished Mr. McKinney to discontinue such practices, and warned Mr. McKinney that repetition of such conduct may lead to the imposition of more disciplinary sanctions. [Compl. Ex. 17]

21. New York (1-14-91): New York suspended Mr. McKinney's license to practice as a professional engineer in the State of New York for 2 years, with the suspension stayed, and with Mr. McKinney placed on probation for a period of 2 years under specific terms. [Compl. Ex. 17]

22. Nevada (3-29-91): The Nevada Board of Registered Professional Engineers and Land Surveyors disciplined Mr. McKinney based upon the discipline imposed upon Mr. McKinney by the Texas State Board of Registration of Professional Engineers. There is no evidence in the record, however, about the type of discipline that the Nevada Board imposed upon Mr. McKinney. [Compl. Ex. 17]

23. Wisconsin (11-15-91): Wisconsin suspended Mr. McKinney's license to practice professional engineering in Wisconsin for a term to coincide with his suspension in the state of Texas, with the imposition of the suspension in Wisconsin stayed on the condition that the Respondent comply with the conditions of his probation in Texas. [Compl. Ex. 17]

24. Louisiana (11-91): The Louisiana State Board of Registration for Professional Engineers and Land Surveyors and Mr. McKinney entered into a Consent Order in November 1991. The terms of the Consent Order were, in pertinent part:

1. [Mr. McKinney's] registration as a professional engineer in Louisiana is suspended until December 20, 1992, or in the event this Consent Order does not become effective until after December 20, 1991, the suspension period shall be for

one year from the effective date of the Consent Order. during this time period [Mr. McKinney] will not practice or offer to practice engineering in the State of Louisiana; unless under the direct supervision and complete control of a Louisiana Registered Professional Engineer who must seal any engineering work as the responsible professional.

2. [Mr. McKinney's] engineering registration will be reinstated at the end of the suspension period, providing there has been no further disciplinary action as a result of violations of the engineering or land surveying registration laws or rules in Louisiana, or in any other state if such violation(s) were recognized by this Board as being grounds for disciplinary action in Louisiana at the time such occurred. Any such further disciplinary action by other states shall be grounds for the Louisiana State Board of Registration for Professional Engineers and Land Surveyors to file formal charges and call for a disciplinary hearing, and to take any disciplinary action permitted under Louisiana law.

[Compl. Ex. 17]

25. Delaware: The Delaware Board of Engineers accepted the findings of the Texas Board and suspended Mr. McKinney's license until December, 1992 (3 years).

[Compl. Ex. 17]

C.1.b.iii. Nevada (3-14-97)

26. On March 14, 1997, the Nevada Board of Registered Professional Engineers and Land Surveyors issued a Decision and Order in which the Board found that Mr. McKinney had stamped and signed plans that involved electrical engineering when Mr. McKinney was not licensed to practice electrical engineering in Nevada. The Board suspended Mr. McKinney's license to practice mechanical engineering in Nevada for two years and stayed that suspension; the Board placed Mr. McKinney on probation for two years and required Mr. McKinney to meet certain terms of probation; the Board

ordered Mr. McKinney to pay a fine of \$3,500. [Compl. Ex. 17]

C.1.c. Charge 1(a): Mr. McKinney's Representations Regarding Being Under Investigation

27. Charge 1(a) is that Mr. McKinney made untruthful assertions in his NCEES annual renewals for 1988 and 1989 by indicating that he was not presently then under investigation by any state, when he knew that he was under investigation by the state of Texas. [Statement of Facts and Charges, ¶ E]

28. Mr. McKinney completed an NCEES 1988 annual renewal form on March 9, 1988, while Mr. McKinney was in Kentucky. On that form, Mr. McKinney answered "no" to the question, "Are you presently under investigation by a state?" [Compl. Ex. 18]

29. On that date, however, Mr. McKinney knew that he was under investigation by the state of Texas, which is evident by the fact that, on March 10, 1987, Mr. McKinney had corresponded with the Texas Board of Registration for Professional Engineers regarding the Texas Board's investigation of Mr. McKinney's engineering activities in Texas. [Compl. Ex. 17]

30. Accordingly, the Hearing Officer finds that Mr. McKinney made an untruthful assertion in his answer to that question on the NCEES 1988 annual renewal form.

31. Mr. McKinney completed an NCEES 1989 annual renewal form on March 6, 1989, while Mr. McKinney was in Kentucky. On that form, Mr. McKinney answered "no" to the question, "Are you presently under investigation by a state?" [Compl. Ex. 18]

32. On that date, however, Mr. McKinney knew that he was under investigation by the state of Texas, which is evident by: (a) the fact that, on March 10,

1987, Mr. McKinney had corresponded with the Texas Board of Registration for Professional Engineers regarding the Texas Board's investigation of Mr. McKinney's engineering activities in Texas; and (b) the fact that charges had been issued against Mr. McKinney by the Texas Board of Registration for Professional Engineers on July 29, 1988. (Those charges were pending against Mr. McKinney until December 20, 1989, when the Texas Board issued its Final Order.) [Compl. Ex. 17]

33. Accordingly, the Hearing Officer finds that Mr. McKinney made an untruthful assertion in his answer to that question on the 1989 NCEES annual renewal form.

34. In sum, the Hearing Officer finds that Mr. McKinney is guilty of the charge of making untruthful assertions in the NCEES annual renewal forms for 1988 and 1989, by indicating that he was not presently then under investigation by any state, when he knew that he was under investigation by the state of Texas.

C.1.d. Charge 1(b): Mr. McKinney's Representations Regarding Suspension of License

35. Charge 1(b) is that Mr. McKinney made untruthful assertions in his NCEES annual renewals for 1990, 1991, 1994, and later years, by indicating that his license had not been suspended or revoked by a state and that he had not been publicly reprimanded by a state, when in fact his license had been suspended and he had been publicly reprimanded. [Statement of Facts and Charges, ¶ E]

36. Mr. McKinney completed an NCEES 1990 annual renewal form on March 12, 1990, while Mr. McKinney was in Kentucky. On that form, Mr. McKinney answered "no" to the question, "Has your license been suspended or revoked by a state?" [Compl.

Ex. 16, Tab 28]

37. On that date, however, Mr. McKinney knew that his license was currently under probated suspension in Texas (12-20-89). [Compl. Ex. 17]

38. Accordingly, the Hearing Officer finds that Mr. McKinney made an untruthful assertion in his answer to that question on the NCEES 1990 annual renewal form.

39. Mr. McKinney completed an NCEES 1991 annual renewal form on March 12, 1991, while Mr. McKinney was in Kentucky. On that form, Mr. McKinney answered "no" to the question, "Has your license been suspended or revoked by a state?" [Compl. Ex. 16, Tab 27]

40. On that date, however, Mr. McKinney knew that his license was currently under probated suspension in Texas (12-20-89) and New York (1-14-91) and under full suspension in Delaware. [Comp. Ex. 17]

41. Accordingly, the Hearing Officer finds that Mr. McKinney made an untruthful assertion in his answer to that question on the NCEES 1991 annual renewal form.

42. Mr. McKinney completed an NCEES 1994 annual renewal form on May 31, 1994, an NCEES 1995 annual renewal form on November 13, 1995, and an NCEES 1996 annual renewal form on February 29, 1996, while Mr. McKinney was in Kentucky. On each of those forms, Mr. McKinney answered "no" to the question, "Has your license been suspended or revoked by a state?" [Compl. Ex. 16, Tabs 26, 25, 24]

43. By all of those dates, however, Mr. McKinney knew that his license had

been under probated suspension in Texas (12-20-89), New York (1-14-91), and Wisconsin (11-15-91); in addition, Mr. McKinney knew that his license had been under full suspension in Delaware and Louisiana (11-91). [Compl. Ex. 17]

44. Accordingly, the Hearing Officer finds that Mr. McKinney made untruthful assertions in his answers to that question on the NCEES 1994, 1995, and 1996 annual renewal forms.

45. Mr. McKinney completed an NCEES 1997 annual renewal form on May 27, 1997, and an NCEES 1998 annual renewal form on August 19, 1998, while Mr. McKinney was in Kentucky. On those forms, Mr. McKinney answered "no" to the question, "Has your license been suspended or revoked by a jurisdiction?" [Compl. Ex. 16, Tabs 22, 25]

46. By those dates, however, Mr. McKinney knew that his license had been disciplined in several states, as noted above. In addition, on both of those dates, Mr. McKinney knew that his license was currently under probated suspension in Nevada (3-14-97). [Compl. Ex. 17]

47. Accordingly, the Hearing Officer finds that Mr. McKinney made untruthful assertions in his answer to that question on the NCEES 1997 and 1998 annual renewal forms.

48. Mr. McKinney is also charged with making untruthful assertions in the NCEES annual renewal forms by indicating that he had not been publicly reprimanded by a state. There is no evidence in the record that Mr. McKinney ever made such assertions in any NCEES annual renewal form.

49. In sum, the Hearing Officer finds that Mr. McKinney is guilty of the charge of making untruthful assertions in the NCEES annual renewal forms for 1990, 1991, 1994, 1995, 1996, 1997, and 1998, by indicating that his license had not been suspended or revoked by a state, when in fact his license had been suspended by several states. The Hearing Officer also finds that Mr. McKinney is not guilty of the charge of making untruthful assertions in the NCEES annual renewal forms by indicating that he had not been publicly reprimanded by a state.

C.1.d.i. Defenses to Charge 1(b)

50. Mr. McKinney asserts three defenses to this charge, which the Hearing Officer will address in turn.

51. Mr. McKinney's first defense to this charge is that he thought that, once the time periods for the suspensions were over, he was under no obligation to report the suspensions on the NCEES annual renewal forms. The main problem with this defense is that some of the suspensions were in effect at the time that Mr. McKinney completed several of these forms. Specifically, on the dates on which Mr. McKinney completed the 1990, 1991, 1997, and 1998 annual renewal forms, the suspensions were still in effect as follows:

- 1990 form: current probated suspension in Texas
- 1991 form: current probated suspension in Texas and New York; current full suspension in Delaware
- 1997 form: current probated suspension in Nevada
- 1998 form: current probated suspension in Nevada

If Mr. McKinney had reported these suspensions at the time that the suspensions

were in effect, the Hearing Officer would agree that Mr. McKinney's interpretation of this question would be a reasonable interpretation of the question, and that he would not be required to continue to report these suspensions on the renewal forms after the terms of the suspensions were completed. On the other hand, since Mr. McKinney never reported these suspensions on the NCEES annual renewal forms, even when the suspensions were in effect, the Hearing Officer does not accept Mr. McKinney's interpretation of this question as a reasonable, good faith interpretation of the question, even for those years in which the suspensions were no longer in effect.

For these reasons, the Hearing Officer does not accept this defense.

52. Mr. McKinney's second defense to this charge is, "Since the Texas Board suspension had been probated, without conditions, and Mr. McKinney's engineering license was always in effect, Mr. McKinney did not believe that such resolutions were administrative actions to be reported on a question requesting actual suspensions."

[Respondent's Post-Hearing Response Brief, pp. 10-11]

The first problem with this defense is that, although the Respondent asserts that Mr. McKinney testified to the belief that is asserted in this defense, the Respondent cites no reference in the record to such testimony and the Hearing Officer can find none. Without evidence in the record to support this assertion, the defense must fail.

The second problem with this defense is that, even if there were evidence in the record to support such a belief by Mr. McKinney, not all of the suspensions of Mr. McKinney's licenses at issue in this charge were probated suspensions. Specifically, the suspensions in Delaware and Louisiana were full suspensions of Mr. McKinney's

licenses; still, Mr. McKinney never reported those suspensions on the NCEES annual renewal forms.

If Mr. McKinney had reported those full suspensions on his NCEES renewal forms, the Hearing Officer would agree that Mr. McKinney's interpretation of this question could be a reasonable interpretation of the question, and that it could have been reasonable for Mr. McKinney not to report the probated suspensions on the renewal forms. On the other hand, since Mr. McKinney never reported even the full suspensions on the NCEES annual renewal forms, the Hearing Officer does not accept Mr. McKinney's interpretation of this question as a reasonable, good faith interpretation of the question, even for those suspensions that were not full suspensions.

For these reasons, the Hearing Officer does not accept this defense.

53. Mr. McKinney's third defense to this charge appears to be that all disciplinary actions that were taken against him by state boards were a matter of public record and that those records were available to anyone who wanted to make contact with the boards to obtain that information. [Tr., Vol. V, pp. 79-80] The Hearing Officer agrees with Mr. McKinney that the disciplinary actions taken against him were a matter of public record, and that such public record generally is available to anyone who wishes to obtain it. The existence of such records, however, does not alter the fact that Mr. McKinney made untruthful assertions in several NCEES annual renewal forms; the fact that someone could determine, upon investigation, that Mr. McKinney had made those untruthful statements does not change the untruthful statements into truthful statements.

For that reason, the Hearing Officer does not accept this defense.

C.1.e. Conclusion Regarding Charge 1

54. In sum, the Hearing Officer finds that Mr. McKinney is guilty of the charge of making untruthful assertions in the annual renewals of his NCEES record: (a) for 1988 and 1989, by indicating that he was not presently then under investigation by any state, when he was under investigation by the state of Texas; and (b) for 1990, 1991, 1994, 1995, 1996, 1997, and 1998, by indicating that his license had not been suspended by a state when in fact his license had been suspended.

C.2. Charge 2: Statements Regarding States in which Registered as an Electrical Engineer

55. Charge 2 is that Mr. McKinney made untruthful statements regarding the number of states in which he is registered as an electrical engineer: (a) in testifying before the Nevada Board of Professional Engineers; and (b) in applying for a license as an electrical engineer in California. [Statement of Facts and Charges, ¶ A]

56. In order to understand this charge, it is important to understand the ways in which states register professional engineers and the ways in which Mr. McKinney is registered as an engineer in the various states. Accordingly, before the Hearing Officer addresses each part of this charge, the Hearing Officer will discuss these background items.

C.2.a. Background: Methods of Registering Professional Engineers

57. There are two ways in which states register professional engineers. In the first way, states register individuals generally as professional engineers; once registered in such a state, the professional engineer is permitted to practice in any area of engineering

in which the professional engineer has gained the necessary competence. States that register professional engineers in this manner are called "PE" states. In the second way of registering professional engineers, states register professional engineers in specific engineering disciplines, such as electrical engineering and mechanical engineering; in these states, professional engineers are only permitted to practice engineering in the specific discipline for which the individual is registered. States that register professional engineers in this manner are called "discipline" states. [Tr., Vol. II, p. 101; Vol. III, pp. 6-8]

58. Kentucky is a "PE" state. [Tr., Vol. II, p. 101]

59. The majority of states are "PE" states. The "discipline" states include Arizona, California, Massachusetts, and Nevada. The other states that are at issue in this case are all "PE" states: Ohio, Minnesota, Missouri, Montana, Nebraska, New Mexico,³ Pennsylvania, and Wisconsin. [See ORC 4733.01 *et seq.* (Ohio); Minn. Stat. 326.02 *et seq.* (Minnesota); R.S.Mo. 327.011 *et seq.* (Missouri); Mont. Code Anno., § 148 *et seq.* (Montana); R.R.S. Neb. 81-3401 *et seq.* (Nebraska); NMSA 61-23-1 *et seq.* (New Mexico); 63 P.S. § 148 *et seq.* (Pennsylvania); Wis. Stat. § 443.01 *et seq.* (Wisconsin).]

C.2.b. Background: Mr. McKinney's Registrations in Various States

60. At the times relevant to this matter, Mr. McKinney was registered as a professional engineer in the "discipline" states as follows: Mr. McKinney was registered in Massachusetts as an electrical engineer beginning on June 30, 1994. Mr. McKinney

³While New Mexico licenses engineers only as "professional engineers," it also qualifies engineers in specific branches of engineering.

was registered in Arizona as both an electrical and a mechanical engineer beginning on February 6, 1996. Mr. McKinney was registered in California as a mechanical engineer. Mr. McKinney was registered in Nevada as a mechanical engineer. [Tr., Vol. III, p. 9; Compl. Ex. 16, Tab 31]

61. Mr. McKinney knows the difference between a "PE" state and a "discipline" state [Tr., Vol. III pp. 6-8], as indicated in his testimony on January 17, 1997, at a Nevada hearing:

Q: You're aware that Nevada is a discipline state and that we register here by discipline, correct?

Mr. McKinney: Yes, sir.

Q: And you are not allowed to practice outside of your discipline in the State of Nevada. Do you understand that?

Mr. McKinney: Yes, I understand

. . . Q: The reason I ask this question, I'm being very candid, . . . I have some personal concerns based upon what I've heard here today, whether you fully understand the significance of the actual stamping in a discipline state, . . . but in a discipline state we are very specific to what you can and cannot do, and I have not been convinced today that you yet understand the difference.

Mr. McKinney: I do understand the difference. I understand that you got a separate discipline for a mechanical engineer, electrical engineer, a structural engineer, and so forth. And I've admitted I made an error, and not being correct in signing the one electrical sheet that . . . but I am very much aware of it because I understand, because my income is determined by keeping my registrations and working with these various clients. So I understand the liability and understand the consequences. So I am very cognizant of what the responsibilities and requirements are.

[Compl Ex. 15, pp. 4, 36-37]

62. Mr. McKinney is not certain regarding the nature of his registrations in the various states. This is true even though Mr. McKinney testified at a Nevada hearing on January 17, 1997, that he was taking steps to clear up his confusion on this question:

Q: Why don't you tell the members of the board what you have done since this situation unfolded, and what you will do from this point forward, to be absolutely sure that in Nevada, as in the other discipline states, you will not slip up, you will not stamp something that says electrical or whatever, unless you are duly registered in that field.

Mr. McKinney: Well, I have a large chart behind my desk with all the states in big letters, and which field I'm registered in. And each project we get in, we're double checking to make absolutely sure that I don't sign or seal any in any states or disciplines that I'm not registered or required by that state to be registered. So we double check it - I have a person in our print room that checks it and will even call the city, state or municipality to triple check it. To make sure what they'll accept and what they won't. So that's the method of the control of determining what's acceptable and what's not at this stage.

[Comp. Ex. 15, pp. 34-35]

63. In putting this chart together, Mr. McKinney did not check his own files to see the registrations from each state, to determine the manner of his registrations in the various states. Rather, he or his staff made calls to the various state building departments to determine what was allowed and what was not allowed. [Tr., Vol. III, pp. 28-29]

64. Despite the assurance given by Mr. McKinney in January 1997, Mr. McKinney still does not know whether Montana, Nebraska, and Wisconsin are "PE" or "discipline" states. [Tr., Vol. III, pp. 14, 14-15] While Mr. McKinney now correctly believes that Missouri is a "PE" state and not a "discipline" state [Tr., Vol. III, p. 14], Mr. McKinney also believes that Minnesota is a "discipline" state [Tr., Vol. III, p. 10], when in

fact Minnesota is a "PE" state. While Mr. McKinney now knows that he does not have a license as an electrical engineer in Ohio [Tr., Vol. III, p. 15], he does not know whether he is licensed as an electrical engineer in Missouri, Montana, Nebraska, and Wisconsin. [Tr., Vol. III, pp. 15-16]

C.2.c. Charge 2(a): Statements at a Nevada Hearing

65. Charge 2(a) is that Mr. McKinney, in testimony before the Nevada Board of Professional Engineers and Land Surveyors, made untruthful statements regarding the number of states in which he was registered as an electrical engineer. [Statement of Facts and Charges, ¶ A]

66. In January 1996, a Complaint was filed before the Nevada Board of Professional Engineers and Land Surveyors alleging that Mr. McKinney stamped drawings in Nevada involving electrical engineering, which was outside the discipline of mechanical engineering for which he was registered in Nevada. [Compl. Ex. 15]

67. On January 17, 1997, a hearing was held before the Nevada Board of Professional Engineers and Land Surveyors in Reno, Nevada, regarding that Complaint. Mr. McKinney testified at that hearing. [Compl. Ex. 15]

68. During his testimony at that Nevada hearing, Mr. McKinney testified regarding the status of his registrations as a mechanical and electrical engineer as follows:

Q: Are you registered as a mechanical engineer in other jurisdictions?

Mr. McKinney: I'm registered in various ways. In Massachusetts I'm registered as an engineer, mechanical engineer, electrical engineer, and HVAC engineer. In

Arizona I'm registered as a mechanical engineer and an electrical engineer. In Minnesota I'm registered dual registration - mechanical and electrical. And I believe I have about 13 states I'm registered in as electrical engineer.

Q: You believe there are 13 states in which you are registered as a mechanical?

Mr. McKinney: No, as an electrical engineer.

Q: Do you recall in how many jurisdictions you are registered as a mechanical engineer?

Mr. McKinney: Well, the majority of the states don't have that discipline registration. The majority of the states you can practice engineering according to your education or experience. So there are only a few states, let's see, Nevada, Arizona, California and Minnesota and Massachusetts are the only states to my knowledge in the nation that differentiate if you're an engineer or registered engineer you can practice, again, whatever your education and experience dictates.

[Compl. Ex. 15, pp. 3-4]

69. Thus, although Mr. McKinney acknowledged that he knew of only 5 "discipline" states, he also generally asserted that he believed that he was registered as an electrical engineer in about 13 states. In addition to this general assertion, Mr. McKinney also asserted that he was registered as an electrical engineer in 3 specific states: Massachusetts, Arizona, and Minnesota.

70. In fact, at the time of his testimony at the Nevada hearing, Mr. McKinney was registered as an electrical engineer in only 2 states: Arizona and Massachusetts. (The Hearing Officer notes that Minnesota, for which Mr. McKinney also specifically claimed registration as an electrical engineer, is a "PE," rather than a "discipline," state, and so Mr. McKinney could not have been registered as an electrical engineer in

Minnesota.)

71. Therefore, the Hearing Officer finds that Mr. McKinney's statement that he believed that he was registered as an electrical engineer in about 13 states was an untruthful statement.

C.2.d. Charge 2(b): Statements in Application for Licensure in California

72. Charge 2(b) is that Mr. McKinney, in applying for a license as an electrical engineer in California, made untruthful statements regarding the number of states in which he was licensed as an electrical engineer. [Statement of Facts and Charges, ¶ A]

73. On September 20, 1995, Mr. McKinney signed an Application for Registration as a Professional Engineer, which he then submitted to the Board of Registration for Professional Engineers and Land Surveyors in California. As part of this application, Mr. McKinney stated:

Earl F. McKinney is licensed in 49 states, the District of Columbia and Puerto Rico. In California, registered as a Mechanical Engineer license #18456. In addition, Earl is currently a licensed Electrical Engineer in Missouri, Montana, Nebraska, Ohio and Wisconsin.

[Compl. Ex. 16, Tab 7] Mr. McKinney signed this Application in Kentucky.

74. On January 4, 1996, the Assistant Executive Officer of the California Board of Registration for Professional Engineers and Land Surveyors wrote to Mr. McKinney, stating:

Under California law you cannot use your Mechanical Engineering examination to waive the Electrical Engineering examination. . . . You have two options regarding your Electrical Engineering application. 1) You can withdraw your application as filed in error. . . . 2) You can be evaluated to test for the Electrical Engineering Examination. . . .

[Compl. Ex. 16, Tab 12]

75. On January 8, 1996, Mr. McKinney responded to that letter by requesting that his application "be given proper consideration on the merits under the Board's requirements." In addition, Mr. McKinney stated: "To aid in the processing of my application I have included the wet stamp for my electrical registrations." The sheet included with this letter was a page with 7 seals on it; the 7 seals were professional engineer seals for Mr. McKinney for the states of Wisconsin, Pennsylvania, Nebraska, Montana, Ohio, Missouri, and Massachusetts. [Compl. Ex. 16, Tabs 8, 9, 10, 14] Mr. McKinney made this response while he was in Kentucky.

76. Thus, in applying for registration as an electrical engineer in California in 1995-96, Mr. McKinney made two representations regarding the states in which he was registered as an electrical engineer. The first representation, made on September 20, 1995, was that Mr. McKinney was a licensed electrical engineer in 5 states: Missouri, Montana, Nebraska, Ohio and Wisconsin. The second representation, made on January 8, 1996, was that Mr. McKinney was a licensed electrical engineer in 7 states: Wisconsin, Pennsylvania, Nebraska, Montana, Ohio, Missouri, and Massachusetts.

77. In fact, there was only one of any of the states claimed by Mr. McKinney in which Mr. McKinney was actually registered as an electrical engineer in 1995-96: Massachusetts. None of the remaining states mentioned by Mr. McKinney are "discipline" states, so it was impossible for Mr. McKinney to have been registered in those states as an electrical engineer.

78. Accordingly, the Hearing Officer finds that Mr. McKinney's statements

provided with his 1995-96 California application regarding the specific states in which he was registered as an electrical engineer were untruthful statements.

79. On July 13, 1998, Mr. McKinney signed another Application for Registration as a Professional Engineer, which he then submitted to the Board of Registration for Professional Engineers and Land Surveyors in California. As part of this application, Mr. McKinney stated:

Earl F. McKinney is licensed in 49 states, the District of Columbia and Puerto Rico. In California registered as a mechanical Engineer, License #18456. In addition, Earl is currently a licensed Electrical Engineer in Arizona, Massachusetts, Missouri, Montana, Nebraska, New Mexico, Ohio, and Wisconsin. Earl also has an application for electrical engineer submitted for the state of Louisiana.

[Compl. Ex. 16, Tab 31] Mr. McKinney signed this Application in Kentucky.

80. With his application, Mr. McKinney submitted a page with 8 seals on it, with the following hand-written notation: "8 states of 50 that I have obtained separate electrical engineer registrations." The 8 seals were professional engineer seals for Mr. McKinney for the states of Arizona, Massachusetts, Missouri, Montana, Nebraska, New Mexico, Ohio, and Wisconsin. [Compl. Ex. 16, Tab 20]

81. As part of the 1998 California application process, Arizona and Massachusetts verified that Mr. McKinney was registered as an electrical engineer in those states. [Compl. Ex. 16, Tab 31] In addition, although New Mexico is not a "discipline" state, *per se*, it does qualify engineers in specific branches of engineering; Mr. McKinney is qualified as an electrical engineer in New Mexico.

82. The remaining states included in Mr. McKinney's 1998 submission

(Missouri, Montana, Nebraska, Ohio, and Wisconsin) are not discipline states, so it was impossible for Mr. McKinney to have been registered in those states as an electrical engineer. Moreover, Mr. McKinney testified that, after he put the chart together regarding his registrations (about which he testified in the Nevada hearing on January 17, 1997), he knew that Ohio was not a discipline state; since he testified on January 17, 1997, that this chart had been put together, the Hearing Officer finds that Mr. McKinney knew that Ohio was not a discipline state when Mr. McKinney made his 1998 submission to California. [Tr., Vol. III, p. 29]

83. Accordingly, the Hearing Officer finds that Mr. McKinney's statement provided with his 1998 California application regarding the specific states in which he was registered as an electrical engineer was an untruthful statement.

C.2.e. Defense to Charge 2

84. Mr. McKinney's defense to charge 2 seems to be that the untruthful statements that he made regarding the specific states in which he was licensed as an electrical engineer were not made intentionally. Mr. McKinney makes two arguments in support of this defense.

85. Mr. McKinney's first argument in support of this defense is that his statements at the Nevada hearing were not intentionally untruthful because he only testified that he "believed" that he was registered as an electrical engineer in about 13 states. He states that he was not "absolutely sure" about the number of states in which he was registered as an electrical engineer when he gave this testimony. [Tr., Vol. V, p. 84]

86. The Hearing Officer does not accept Mr. McKinney's first argument in support of this defense. In order for a "belief" to act as a defense for making an untruthful statement, the belief would need to be reasonable and to be held in good faith. The Hearing Officer finds that Mr. McKinney's "belief" was neither reasonable nor held in good faith. First, Mr. McKinney testified that he knew the difference between a "discipline" state and a "PE" state, and that he knew of 5 "discipline" states; given that testimony, it was not reasonable for Mr. McKinney to testify that he believed he was registered as an electrical engineer in 13 states, when, according to his own testimony, it would have been possible for him to be so registered in only 5 states. Second, the Hearing Officer finds that it is neither reasonable nor in good faith for Mr. McKinney to plead ignorance regarding the status of his registrations as a professional engineer, since Mr. McKinney clearly intends to practice engineering in the states in which he is registered, it is his responsibility to know the way in which he is registered in those states. Third, the Hearing Officer finds that the way in which Mr. McKinney is registered as an engineer in the various states is a matter that is easily ascertainable and verifiable from the various state agencies that register engineers; Mr. McKinney could easily have determined the way in which he is registered in the various states if he had chosen to do so. Indeed, given that fact that Mr. McKinney testified that he has not even checked his own files to make this determination [Tr., Vol. III, p. 36], it appears that determining the status of his registrations in the various states may be as easy as checking his own files. Mr. McKinney's lack of reasonableness and good faith in this regard is evidenced by the fact that, as late as the hearing held in this matter in November 2001, Mr. McKinney still

did not know the way in which he is registered in the various states.

87. Mr. McKinney's second argument in support of this defense is that Mr. McKinney thought that he was registered as an electrical engineer in the states that he listed in his 1995-96 and 1998 California applications because his engineering seals for those states included an "E" in the registration numbers that appeared on the seals. [Tr., Vol. III, p. 26]

88. The Hearing Officer does not find this second argument plausible, however. First, not all of the seals that Mr. McKinney included in his California applications include the letter "E" on the seal. Specifically:

- Mr. McKinney's seals for Massachusetts and Arizona, which are the only two states in which Mr. McKinney was registered as an electrical engineer, do not include the letter "E" on the seals. Rather, the seals include the word "electrical." [Compl. Ex. 16, Tabs 14 and 20] Including the word of the particular discipline for which the individual is registered on the seal appears to be the standard for the seals for the "discipline" states: Mr. McKinney's California seal includes the word "mechanical," which is the discipline for which Mr. McKinney is registered in California [Compl. Ex. 16, Tab 21]; Mr. McKinney's Nevada seal includes the phrase "mechanical engineer," which is the discipline for which Mr. McKinney is registered in Nevada [Compl. Ex. 15].
- Mr. McKinney's seal for New Mexico contains neither the letter "E" nor the word "electrical." [Compl. Ex. 16, Tab 20]

Second, Mr. McKinney did not include Pennsylvania on his 1998 list of states for which he claimed registration as an electrical engineer, even though his Pennsylvania seal includes the letter "E." [Compl. Ex. 16, Tabs 14 and 20]

Third, Mr. McKinney testified that the Nevada hearing (which occurred on January 17, 1997) brought to his attention just how important it was to know about the status of

his registrations in the various states. [Tr., Vol. III, pp. 31-32] He indicated that after the Nevada hearing he went back and checked and determined that the "E" on the seals stood for the word "engineer" and did not indicate licensure as an electrical engineer. [Tr., Vol. III, p. 29] Thus, by at least the time of his 1998 California application, Mr. McKinney knew that the "E" on an engineering seal did not indicate registration as an electrical engineer.

89. Therefore, for all of these reasons, the Hearing Officer rejects this defense to this charge. "

C.2.f. Conclusion Regarding Charge 2

90. In sum, the Hearing Officer finds that Mr. McKinney is guilty of the charge of making untruthful statements regarding the number of states in which he is registered as an electrical engineer: (a) in testifying before the Nevada Board of Professional Engineers; and (b) in applying for a license as an electrical engineer in California.

C.3. Charge 3: Statements Regarding the Extent of Practice in Nevada

91. Charge 3 is that Mr. McKinney, in testimony before the Nevada Board of Professional Engineers and Land Surveyors, made statements in an untruthful manner regarding the extent of Mr. McKinney's engineering practice in Nevada. [Statement of Facts and Charges, ¶ A]

92. During his testimony at the Nevada hearing referenced above (January 17, 1997), Mr. McKinney testified regarding why he signed and sealed electrical engineering work in Nevada when he was not registered as an electrical engineer in Nevada:

Q: Would you explain to the board why you stamped and signed electrical engineering work even though you are not

registered as an electrical engineer in the State of Nevada?

Mr. McKinney: Well, it was a mistake on my part. When I'm doing a number of these projects, I guess I saw the ME and I either did it mistakenly or I did not realize I was signing an electrical sheet in the State of Nevada in which I'm not a registered engineer. But I have made application in the last year for electrical registration. . . .

Q: That's my question, Mr. McKinney, were you aware that you were submitting electrical plans to the State of Nevada at the time you signed your seal?

Mr. McKinney: I didn't at the time, I didn't realize or I didn't recollect at the time that I was not registered as an electrical. And I thought, in relation to some states relate this to being incidental to the project because it's such a small space. . . . So this is in some places considered incidental to the project, but I made an error by signing it not being registered in Nevada as an electrical engineer.

[Compl. Ex. 15, pp. 9-10]

93. The Board alleges that these statements by Mr. McKinney were intended to lead the Nevada Board to believe that his sealing of one set of plans was an isolated incident, and that he simply forgot that he was not registered as an electrical engineer in Nevada, when in fact he was involved with numerous projects in Nevada.

94. Between February 15, 1994, and October 11, 1995, 26 different projects located in Nevada came into the offices of A & E Designers, Inc. [Compl. Exs. 1 and 4] Those projects would have required some type of review by Mr. McKinney. There is no evidence in the record, however, that Mr. McKinney signed and sealed any of those projects as an electrical engineer. Nor does the Hearing Officer find any evidence to support the allegation that Mr. McKinney was attempting to mislead the Nevada Board regarding the extent of his work on Nevada projects; the specific question of the extent

of Mr. McKinney's work in Nevada was not discussed in any kind of detail, or in any way by Mr. McKinney that the Hearing Officer finds to be misleading or untruthful.

95. In sum, the Hearing Officer finds that Mr. McKinney is not guilty of the charge of making statements in an untruthful manner at the Nevada hearing regarding the extent of Mr. McKinney's engineering practice in Nevada.

C.4. Charge 4: Statements Regarding the Number of Engineers on Staff

96. Charge 4 is that Mr. McKinney, in testimony before the Nevada Board of Professional Engineers and Land Surveyors, made untruthful statements regarding the number of engineers on his staff. [Statement of Facts and Charges, ¶ A]

97. During his testimony in the above-referenced hearing in Nevada on January 17, 1997, Mr. McKinney testified regarding the number of people working with him as follows:

Q: Perhaps it would be helpful if you advised the board as to your size of your organization.

Mr. McKinney: OK. I have approximately 30-35 persons and I've got three structural engineers, three electrical engineers, and three mechanical engineers, and I believe about 25 CAD stations networked together on a Novell network, driving two 38-inch Hewlett Packard plotters. And I've also got a Hewlett Packard 4B laser printer which runs 11 x 17 at 16 sheets a minute. And I also have a phone modem with a separate line. I've got E-Mail, and I'm just developing a web page. This is something I've researched. This is the 50-code requirement from all 50 states in the nation with all the deviation from whatever codes they are. A lot of people require that. That's going to be on our web page in about 3 months.

... Q: OK, when you said you have 35 people. Is that you that has it or A & E?

(9)

(10)

(11)

(12)

(13)

Mr. McKinney: It's A & E, I just say we're in the firm, it's approximately.

... Mr. McKinney: Well, yeah, I've got 30 people working for me - I've got 3 structural engineers - and I can't do all the work.

... Mr. McKinney: I have 30 persons, and nine different engineers.

Q: But you're a consultant to AE.

Mr. McKinney: Right. They do the designs and I check and review all the designs.

[Compl. Ex. 15, pp. 12, 15, 16, 40] Thus, Mr. McKinney testified that he had nine engineers working for him: 3 structural engineers, 3 electrical engineers, and 3 mechanical engineers.

98. When Mr. McKinney indicated that he had nine engineers working for him, he testified that he was including outside consultants whom he uses as needed. He considers the outside consultants to be part of his organization. [Tr., Vol. III, p. 62; Vol. V, p. 85] He testified that he was referring to the outside consultants who work in and around Lexington, Kentucky, but, in fact, he also uses outside consultants from around the country as needed. [Tr., Vol. V, pp. 83-84]

99. A & E Designers, Inc., hires engineers as outside consultants as needed when the company's work load requires such assistance. These consultants are hired to work on particular projects. [Tr., Vol. IV, pp. 120-121; Vol. V, pp. 75, 161-162] The company does that, rather than having the engineers on staff as full-time employees, because the company does not have enough continuous work for the outside consultants in the fields of their expertise. [Tr., Vol. V, pp. 74-75]

100. Telephone listings for A & E Designers, Inc., were provided to the company employees on October 29, 1996, December 6, 1996, and March 25, 1997.

[Tr., Vol. I, p. 93; Comp. Ex. 9] These are listings of people who work for the company full time; the listings also include some outside consultants.

101. These telephone listings are consistent with Mr. McKinney's testimony that he had approximately 30 - 35 people working for him. The telephone listing for October 29, 1996, listed 27 people other than Mr. McKinney. The telephone listing for December 6, 1996, listed 32 people other than Mr. McKinney. The telephone listing for March 25, 1997, listed 30 people other than Mr. McKinney. [Compl Ex. 9]

102. The telephone listings, however, are not consistent with Mr. McKinney's testimony that the 30 - 35 people that he had working for him included 9 engineers. The telephone listing for October 29, 1996, listed one full-time structural engineer (Bob Wooton) and one outside consultant structural engineer (Farid Mohseni). The telephone listing for December 6, 1996, listed one full-time structural engineer (Bob Wooton) and one outside consultant structural engineer (Paul Haggard). The telephone listing for March 25, 1997, listed one full-time structural engineer (Bob Wooton) and two outside consultant structural engineers (Paul Haggard and Farid Mohseni). [Tr., Vol. I, pp. 94-98; Compl. Ex. 9]

103. Mr. McKinney's explanation for this inconsistency is that the outside consultants often were not included on the telephone listings. While the Hearing Officer understands and accepts the fact that a company telephone list might not include any of the outside consultants used by the company, no credible evidence was presented to

explain why the company telephone list would include some but not all of the outside consultants used by the company at the time that the list was generated. On the March 27, 1997, telephone list, for example, there is a separate listing at the bottom of the page that is titled "consultants"; that separate listing includes only two engineer consultants. No credible explanation was given regarding why, if there were, in fact, numerous other outside consultants being used at the time that this list was generated, the names of the other consultants were not included on this list.

104. Even if, however, there were some credible explanation for not including the names of all of the outside engineer consultants on the company telephone list, there has been no evidence offered to supply the names of the 9 engineers whom Mr. McKinney claimed were working for him in January 1997. When Mr. McKinney testified about this issue at the hearing in the present matter, he identified by name only three outside consultant engineers with whom he worked at that time: Paul Haggard (structural engineer) Farid Mohseni (structural engineer), and Joe Pogue (structural engineer). Mr. McKinney also identified Joe Howard (electrical engineer) as a consultant with whom he presently works. [Tr., Vol. V, pp. 74-75] Although Tony Smith, the former General Manager for A & E Designers, Inc., also testified that outside consultants were used by the company, Mr. Smith only indicated that those outside consultants were electrical engineers and structural engineers. Except for the engineer consultants on the telephone listings (Bob Wooton, Paul Haggard, and Farid Mohseni), Mr. Smith identified none of the engineer consultants by name; neither did Mr. Smith indicate the number of those outside consultants who were used by the company. [Tr., Vol. IV, pp. 117-121]

Bob Wooton, a former full-time engineer consultant for A & E Designers, Inc., identified two Kentucky outside engineer consultants, in addition to Paul Haggard and Farid Mohseni, who worked with the company at the time in question: Joseph Pogue (structural engineer) and Grant Wilson (electrical engineer). Mr. Wooton also testified that he does not know Joe Howard, the electrical engineer consultant with whom Mr. McKinney presently works. [Tr., Vol. I, pp. 94-98; Vol. II, pp. 43-47]

105. Thus, the Hearing Officer finds that, while A & E Designers, Inc., may have used additional consultants from time to time, in January 1997 the company used, at most, five outside consultants on a regular enough basis to consider them to be part of the company: Bob Wooton (full-time structural); Paul Haggard (structural); Farid Mohseni (structural); Joseph Pogue (structural); and Grant Wilson (electrical). Of those five engineer consultants, 4 are structural engineers and one is an electrical engineer; none of those individuals is a mechanical engineer. Clearly, this number of consultant engineers does not constitute the nine engineers represented by Mr. McKinney as being part of "his organization," three of whom were to be structural engineers, three of whom were to be electrical engineers, and three of whom were to be mechanical engineers.

106. Accordingly, the Hearing Officer finds that Mr. McKinney is guilty of the charge of making untruthful statements at the Nevada hearing about the number of engineers on his staff.

D. Category 2 of Charges: Allegations of Signing and Sealing Plans Inappropriately

107. Charges 5, 6, 7, 8, and 9 deal with allegations that Mr. McKinney signed and sealed engineering plans inappropriately. The Hearing Officer will address each of

these charges in turn. First, however, the Hearing Officer will address background information regarding the requirement of signing and sealing plans,

D.1. Background: Signing and Sealing Plans

108. An engineer is required to sign, date, and stamp with his seal any plans that the engineer has approved before the approved plans are delivered to the client or to a public agency. [See KRS 322.340; Tr., Vol. I, p. 65] The engineer's original signature and seal are required on each drawing included in every set of plans that the engineer has approved, whether the drawing is the original drawing or a copy of the original drawing. [Tr., Vol. IV, p. 112] All states require a registered or licensed engineer to sign and seal plans that the engineer has approved. [Tr., Vol. V, p. 177]

109. The engineer who signs and seals a plan becomes responsible for what is on each drawing that the engineer has signed and sealed. One of the reasons for requiring a registered engineer to sign and seal engineering plans is to ensure that someone with the required expertise has reviewed the project and has determined that the project meets the requirements for protecting life and safety. [Tr., Vol. V, pp. 176-177] Mr. McKinney believes that the paramount duty of the engineer in reviewing plans is to protect the life and safety of the people who will be occupying the building in question. [Tr., Vol. V, p. 16]

110. When an engineer reviews a set of plans, the engineer should be reviewing the plans for code compliance and for engineering integrity. [Tr., Vol. I, p. 101] Some of the review could require computations. [Tr., Vol. I, pp. 105-106] When such computations are involved, the reviewing engineer either would have to do the

calculations from scratch or would have to check the calculations of the person who drew the plans. [Tr., Vol. I, p. 127]

D.2. Charge 5: Signing and Sealing Engineering Plans Without Review

111. Charge 5 is that, between 1993 and 1996, Mr. McKinney customarily signed and sealed engineering plans and mailed them out the same day or the next day without having reviewed the plans. [Statement of Facts and Charges, ¶ I]

112. In order to address this charge, it is important to understand prototype projects and plans, the way in which prototype plans are developed and reviewed, and the involvement of Mr. McKinney and A & E Designers, Inc., with the development and review of prototype plans. Therefore, before the Hearing Officer addresses the substance of this charge, the Hearing Officer will address this background information.

D.2.a. Background: Prototype Projects and Plans

113. There are two general types of projects in engineering firms. One type is the specialty project, which is a one-of-a-kind project. The other type are prototype projects, which are projects that have the same standard design details in each project and that use these standard design details on repeat projects. [Tr., Vol. III, p. 67; Vol. V, pp. 160-161]

114. Common examples of prototype projects are fast food restaurants, hotels, and retail stores.

115. A plan for a prototype project may be developed for a specific building code that is used by several states. The standard design details in such a prototype plan would be complete and in compliance with the specific building code for which it was

developed. [Tr., Vol. II, p. 19] The standard design details in such a prototype plan may still need to be changed to accommodate local building code requirements. [Tr., Vol. V, p. 16]

116. In addition, a plan for a prototype project may be developed for different regions of the country, to account for special climate and geological conditions in those difference parts of the country. The standard design details in such a prototype plan would be sufficient to meet the same general climate and geological conditions in a region. [Tr., Vol. III, pp. 87-88; Vol. V, pp. 69-70] The standard design details in such a prototype project may still need to be changed to meet local differences in conditions. For example, the soil conditions could differ even from one side of town to another side of town; such differences would need to be taken into consideration in the final design details for the plan. [Tr., Vol. I, pp. 11-12]

117. Thus, even if a plan is a prototype design, the engineer would need to review the plan, before the engineer signs and seals the plan, to ensure that the plan meets all state and local code requirements and all requirements for different climatic and geological conditions.

118. The time needed to design and review a project depends on the size and nature of the project. If the project is a small project in an already-existing structure, such as a mall, the project could be completed in a day. If it is a larger, free standing project, it could take 30-45 days to complete the project. [Tr., Vol. III, p. 66]

D.2.b. Background: Mr. McKinney's Involvement with Prototype Plans

119. Mr. McKinney and A & E Designers, Inc., specialize in prototype projects,

such as hotels, restaurants, and retail stores. A & E Designers, Inc., directs its marketing to companies that do this type of repeat project, such as restaurants (e.g., McDonald's, KFC, Taco Bell, and Pizza Hut), hotel chains (e.g., Holiday Inn Express), and retailers (e.g., Claire's Boutique). [Tr., Vol. V, pp. 12-13]

120. At A & E Designers, Inc., approximately 85% of the company's projects are prototype projects and approximately 15% of the company's projects are specialty projects. [Tr., Vol. V, p. 161] Mr. McKinney describes the work performed by A & E Designers as follows:

Projects include food service facilities, hotels, motels, and resorts; shopping centers; office buildings; retail stores; housing; grocery stores; manufacturing plants; warehouses; educational and training facilities; laboratories; post offices; clubhouses and recreational facilities; service stations.

(1) A & E Designers has provided Architectural and Engineering Services for thousands of prototypes . . . across the United States. . . .

(2) A & E Designers has designed or site adapted a large number of prototypes (Please note that the design of these prototypes have been completed over the past 20 years. Also many of these prototypes have been designed under the name of Hamill and McKinney Architects and Engineers, Inc.)

[Resp. Ex. 5]

121. Mr. McKinney often works with a national company (such as National Air Systems, Kinko's, and Heilig-Meyers) in the development of the company's original prototype designs. [Tr., Vol. III, p. 72; Vol. V, p. 22] Sometimes Mr. McKinney will visit the company headquarters and work with company officials for two or three days to develop the prototypes. [Tr., Vol. V, pp. 22-23] Sometimes, such as with Holiday Inn

Express, Mr. McKinney will obtain a contract to produce the prototype designs for the company. [Tr., Vol. V, p. 23] Sometimes, such as with Sonic Industries, Mr. McKinney will obtain a contract to upgrade the company's standard plans to meet all current codes. [Tr., Vol. V, pp. 57-58; Resp. Exs. 12, 13]

122. Mr. McKinney has helped to prepare prototype designs for between 50 and 100 companies (hotels, retail stores, and restaurants). [Tr., Vol. V, p. 24] The prototype designs that are developed are then used in many different projects. [Tr., Vol. III, pp. 73-74; Vol. V, p. 23]

123. This preparation of a prototype design occurs before Mr. McKinney is asked to review a particular, site-specific project. [Tr., Vol. V, pp. 32-33]

124. One type of prototype design is for a store that is put into a mall or another already-existing structure. These projects are smaller and take less time to design and review than the designs for a free-standing building. [Tr., Vol. V, pp. 167-168]

125. A & E Designers, Inc., does a lot of these small prototype projects, like Claire's Boutique stores, which are six to eight hundred square feet stores located in malls. The company completes about 200 Claire's Boutiques each year. Each project can take less than one day to complete. [Tr., Vol. III, pp. 66-67] The company completed over 200 Dollar General stores in 2001; each of those projects could be completed in less than a day. [Tr., Vol. III, p. 67] The company completed over 180 Dollar Tree stores in 2001; each of those projects could be completed in about one day. [Tr., Vol. III, p. 67]

126. Some manufacturers will send in designs for standard manufactured

products to be reviewed and approved by A & E Designers, Inc. These products will often be used over and over again in the same type of facility, so the designs for these products are used as prototype designs. [Tr., Vol. V, pp. 168-169]

127. As more and more prototype projects are done for a client, fewer revisions need to be made on the prototype plans. [Tr., Vol. V, p. 65] Less time is also needed in the review process, because fewer changes need to be made in the plans. [Tr., Vol. I, p. 21; Vol. V, p. 65]

D.2.c. Background: Review of Plans and Projects at A & E Designers, Inc.

128. There is some inconsistency in the testimony regarding the manner in which plans are handled at A & E Designers, Inc. Although Mr. McKinney testified that he reviews plans before they go the print room [Tr., Vol. V, p. 111], Mr. McKinney also testified that, when a set of engineering plans arrives in the offices of A & E Designers, Inc., the plans are delivered either to the print room (for copying) or to Mr. McKinney's office for review. [Tr., Vol. III, p. 83] Mr. McKinney also testified that he did not sign plans that had been copied in the print room until he had reviewed the plans in his office. [Tr., Vol. III, p. 83]

129. Regardless of the manner in which it happens, once the plans are in their final form, the plans go to Mr. McKinney for his final review and signature and seal. [Tr., Vol. V, pp. 170-171]

130. At A & E Designers, Inc., Mr. McKinney signs and seals all plans that require an engineer's seal. During the relevant time period, no one in the company other than Mr. McKinney signed and sealed any plans. [Tr., Vol. V, pp. 159, 175]

131. Mr. McKinney provides "hands-on" oversight of the engineers and design support staff that work for A & E Designers, Inc. He checks daily on most of the projects in the office. [Tr., Vol. V, p. 36] When he is out of the office, he calls into the office two or three times a day. [Tr., Vol. V, pp. 81-82; Compl. Ex. 8, Tab 4]

132. There is daily communication between A & E Designers, Inc., and its clients regarding the plans that have been submitted for review. [Tr., Vol. V, pp. 64-65]

133. During the relevant time period, A & E Designers, Inc., handled approximately 1000 projects a year; approximately 1% - 2% of those projects were located in Kentucky. About 60% - 70% (i.e., 600 - 700) of those 1000 projects required Mr. McKinney's review of plans and his signature and seal on the final plans; approximately 6 - 14 of those projects were located in Kentucky. [Tr., Vol. V, pp. 101, 173-175]⁴ The remaining 300 - 400 projects per year were requests for designs, requests for calculations, specifications for review, requests for information, and samples. [Tr., Vol. V, pp. 140-147] For all of these different types of projects at A & E Designers, Inc., Mr. McKinney would perform the final review of each project. [Tr., Vol. V, pp. 150-152]

134. During the relevant time period, Mr. McKinney and A & E Designers, Inc., handled the projects that were located in Kentucky in the same manner in which they handled the projects that were located in other states.

⁴The Hearing Officer notes that the parties spent a great deal of time arguing about these numbers, based on what the 1994 and 1995 Master Lists [Compl. Exs. 4 and 1, respectively] either indicated or did not indicate about these numbers. The Hearing Officer finds no testimony regarding the Master Lists very helpful or persuasive in making a finding regarding these numbers based on the information in the Master Lists. The Hearing Officer makes her finding about these numbers solely on the testimony of Mr. McKinney, which the Hearing Officer finds to be credible testimony.

D.2.d. Substance of Charge 5

135. The substance of Charge 5 centers on the question of whether Mr. McKinney customarily signed and sealed engineering plans without first reviewing the plans during the relevant time period.

136. There seems to be no dispute that plans would come into and go out from A & E Designers, Inc., very quickly, sometimes within a day, during the relevant time period. The timing of the comings and goings of these plans at A & E Designers, Inc., however, has very little to do with deciding whether Mr. McKinney reviewed the plans prior to signing and sealing the plans, because often the plans could be involved in review by e-mail, or by in-person visit by Mr. McKinney, prior to the plans actually being delivered to A & E Designers, Inc., for signature and seal. Accordingly, the fact that plans may have been physically present in the offices of A & E Designers, Inc., for only a short period of time does not indicate the amount of time that Mr. McKinney could have spent on the review of the plans prior to signing and sealing the plans.

137. There is no evidence in the record that establishes the standard to be used for setting the amount of time that is required for an engineer to review a set of plans prior to signing and sealing the plans. It does seem clear, however, that the amount of time required for review of plans depends on the nature of the project for which the plans have been developed.

138. Review can be done more quickly on prototype projects than on specialty projects. For example, A & E Designers, Inc., keeps a log of local code requirements; once a prototype plan has been altered to meet local code requirements, very little, if

any, change needs to be made on the plan for use in the same locality for another building using the same prototype plan. [Tr., Vol. V, pp. 27, 33-34] Once A & E Designers, Inc., has applied local code requirements to a prototype plan, the knowledge of those local code requirements can be used in other prototype plans for the same region. [Tr., Vol. V, p. 34]

139. Whatever specific amount of time may be required in the review of plans, every set of plans that comes to an engineer for signature and seal, whether for a prototype project or for a specialty project, will require some code review and some revision, however minor. During the relevant time period, every set of plans submitted to A & E Designers, Inc., required some review by Mr. McKinney before Mr. McKinney signed and sealed the plans for the project. [Tr., Vol. V, pp. 114-116]

140. Mr. McKinney testified that, for a prototype project such as a Perkin's restaurant, which has approximately 40-50 sheets in the final plans, Mr. McKinney would spend between 1 and 2 hours in reviewing the final plans. [Tr., Vol. III, p. 83] For a prototype project such as the Holiday Inn Express in Dry Ridge, Kentucky, Mr. McKinney would spend a few hours in reviewing the final plans. [Tr., Vol. V, pp. 111-112] For a different type of hotel, Mr. McKinney could spend a total of 30 - 40 hours in reviewing the final plans. [Tr., Vol. V, p. 112]

141. Thus, according to Mr. McKinney's testimony, it appears that the minimum amount of time that Mr. McKinney spent on reviewing the final plans for a prototype project was approximately 1 hour, and the maximum amount of time that Mr. McKinney spent on reviewing the final plans for a prototype project was approximately 3 hours.

142. The time required in this process, however, also included the time required for Mr. McKinney to actually sign each page of each set of the plans that he had reviewed. The amount of time required for that process varied, according to the size of the project and the number of sets that had to be signed.

143. The final plans for a free-standing, small fast food restaurant such as Waffle House would include about 20-24 sheets per set of plans. [Tr., Vol. V, pp. 164-165] The final plans for a McDonald's fast food restaurant would include about 35-40 sheets per set of plans. [Tr., Vol. V, p. 165] A larger restaurant, such as Perkin's, would have approximately 40-50 sheets per set of plans. [Tr., Vol. V, p. 166] Larger prototype projects, such as the Holiday Inn Express in Dry Ridge, Kentucky, would have as approximately 125 sheets per set of plans. [Tr., Vol. III, p. 94; Vol. V, pp. 110-111]

144. A number of sets of these plans would be made for Mr. McKinney to sign and seal. Sometimes, two or three sets of the plans would be required; other times a significantly larger number of sets (7 sets or more) of the plans would be required. [Tr., Vol. III, p. 95; Vol. IV, p. 49; Vol. V, pp. 164-166]

145. It would take Mr. McKinney between 30-45 minutes to sign three sets of 24 sheets (for a total of 72 sheets) for a project such as Waffle House. [Tr., Vol. V, pp. 172-173] It would take Mr. McKinney approximately 2 hours to sign 5 sets of 125 sheets (for a total of 625 sheets). [Tr., Vol. V, pp. 110-111] There is no evidence in the record regarding the amount of time that it would take Mr. McKinney to sign a larger number of sets of plans.

146. Thus, according to Mr. McKinney's testimony, the minimum amount of

time that he would spend in signing the sets of prototype plans for a project would be approximately 30 minutes; the maximum amount of time that he would spend in signing the sets of prototype plans for a project would be approximately 2 hours.

147. Consequently, in combining the time that Mr. McKinney estimated that he would spend in reviewing and signing the sets of prototype plans submitted to him, the minimum total amount of time (for both reviewing and signing the sets of prototype plans for a project) would be approximately 1 hour and 30 minutes. The maximum total amount of time (for both reviewing and signing the sets of prototype plans for a project) would be approximately 5 hours. The average amount of time, then, for both reviewing and signing the sets of prototype plans for a project would be approximately 3.25 hours.

148. Mr. Wooton testified that he saw plans come into the office of A & E Designers, Inc., and be signed and sealed with Mr. McKinney's signature and seal, and sent back out without review by Mr. McKinney. [Tr., Vol. I, pp. 98-99] Mr. McKinney testified that he personally reviewed everything that he signed and sealed prior to signing and sealing it. [Tr., Vol. III, p. 83]⁵

149. The Hearing Officer finds that the evidence on the record, and simple arithmetic, support Mr. Wooton's assertions that plans were sent out of A & E Designers,

⁵Although Tony Smith, the former General Manager of A & E Designers, Inc., testified that Mr. McKinney reviewed every set of plans before the plans were sent out [Tr., Vol. IV, p. 66], the Hearing Officer finds that Mr. Smith could not have known if Mr. McKinney actually reviewed the plans before Mr. McKinney signed the plans. While Mr. Smith's testimony is credible regarding the plans being sent to Mr. McKinney's office for review, there is no way for Mr. Smith to have known whether Mr. McKinney actually reviewed the plans that were in Mr. McKinney's office unless Mr. Smith had been in Mr. McKinney's office to observe such review. Mr. Smith, as General Manager of the company, simply had too many other duties to perform to have spent any appreciable amount of time in Mr. McKinney's office.

Inc., that contained Mr. McKinney's seal and signature, but that Mr. McKinney had not reviewed.

150. If Mr. McKinney had spent 8 hours a day, 5 days a week, 52 weeks of the year in reviewing and signing plans (without ever taking a day off, and without ever doing any other type of engineering work or work for A & E Designers, Inc.), Mr. McKinney would have spent a total of 2080 hours a year in those tasks. If there were 600 sets of plans a year that required this service, Mr. McKinney would have averaged 3.47 hours per project; if there were 700 sets of plans a year that required this service, Mr. McKinney would have averaged 2.97 hours per project.

151. If all of those sets of plans had been prototype plans, then it is possible that Mr. McKinney could have reviewed and signed all of those plans, if he had done nothing else for those 2080 hours a year, because the average number of hours per project (2.97 - 3.47 hours) is consistent with the average number of hours (3.25 hours) that it would have taken, according to Mr. McKinney's testimony, for Mr. McKinney to have reviewed and signed the sets of prototype plans, as discussed above.

152. All of the plans submitted for review by Mr. McKinney, however, were not prototype plans. As Mr. McKinney testified, 15% of the projects at A & E Designers, Inc., were specialty projects; the plans for those specialty projects would have taken substantially more time for Mr. McKinney to review.

153. In addition, Mr. McKinney performed many other tasks in his engineering practice besides reviewing, signing, and sealing plans. Mr. McKinney lists his responsibilities in A & E Designers, Inc., during the relevant time period as follows:

Responsible for management and design calculations of civil, (site planning) architectural, structural, mechanical, plumbing, electrical and fire protection; client liaison; facility programming, scheduling and budgeting; overall project development and delivery; review of reports; studies and designs, with projects management design teams; research and supervision; marketing; and contractual decisions.

[Resp. Ex. 5] All of the work in this list would have required some amount of time from Mr. McKinney.

154. This list of responsibilities includes the 300 - 400 other projects (that were not plans) that were submitted to A & E Designers, Inc., each year during the relevant time period, all of which required some form of review by Mr. McKinney. Such review would also have required some amount of Mr. McKinney's time.

155. In addition, Mr. McKinney testified that he spent significant amounts of time helping to design or to develop the designs for original company prototypes. Such work would also require some amount of Mr. McKinney's time.

156. Mr. McKinney testified that he spent a great deal of time working, and that his working hours were not limited to 8 hours a day during the regular work week. But even if Mr. McKinney had worked an extra 10 hours a week for 52 weeks a year, without ever taking any time off, that would only total an extra 520 work hours a year. That number of hours might have been enough time to cover Mr. McKinney's review of the 300 - 400 projects, other than plans, that Mr. McKinney testified he reviewed each year. If there were 300 such projects a year, those extra 520 work hours would have allowed an average of 1.73 hours of review for each project; if there were 400 such projects a year, those extra work hours would have allowed an average of .77 hours of review for

each project. There still would have been no time, however, for Mr. McKinney to have performed all of the other business activities that Mr. McKinney testified that he performed each year during the relevant time period.

157. Accordingly, the Hearing Officer finds that it was impossible for Mr. McKinney to have performed all of the tasks that he says he performed and, at the same time, to have reviewed all plans prior to signing and sealing the plans. Consequently, the Hearing Officer finds that, during the relevant time period, Mr. McKinney signed and sealed plans without first reviewing the plans and, thus, that Mr. McKinney is guilty of this charge.⁶

D.3. Charge 6: Signing Blank Vellum and Blank Blue-Line Sheets

158. Charge 6 is that Mr. McKinney signed blank vellum and blank blue-line sheets so that, in his absence, plans that had not been reviewed by him could be processed and forwarded. [Statement of Facts and Charges, ¶ C]

159. Vellum is a type of paper on which a plan is drawn. Blue-line paper is paper that is used for making a copy from an original that is on vellum or another type of original paper. [Tr., Vol. I, p. 74]

160. Mr. McKinney has signed blank blue-line paper on many occasions. He often would sign a pack of 250 sheets of blue-line paper. [Tr., Vol. I, pp. 76-77; Vol. IV, pp. 48-49]

⁶The Hearing Officer notes that there is some dispute between the parties regarding the requirement that an engineer not sign and seal any document not prepared by him or under his direct supervisory control. The Hearing Officer finds that this regulatory requirement is not connected with this charge, because there is no credible evidence in the record that Mr. McKinney signed and sealed documents that were not prepared under his direct supervisory control.

161. Mr. McKinney testified that he signed blank undeveloped blue-line paper when there were large numbers of copies to make for projects. [Tr., Vol. III, p. 94] He did this because A & E Designers, Inc., uses an ammonia blueprint machine, and the fumes bother his lungs. [Tr., Vol. III, p. 94]

162. Mr. McKinney also signed blank paper when the state seal was an embossed seal, because it is hard to write across an embossed seal. [Tr., Vol. V, pp. 80-81]

163. Mr. McKinney also signed blank paper before he left the office if he had reviewed and approved plans that he then authorized office personnel to make copies of in his absence. [Tr., Vol. III, pp. 95-96] This has happened on numerous occasions. [Tr., Vol. I, p. 77]

164. For example, Mr. McKinney was absent from the offices of A & E Designers from June 23 through July 3, 1994, when he was on a trip to Turkey. [Tr., Vol. I, pp. 80, 83-84; Compl. Ex. 8, Tab 4] While Mr. McKinney was out of the office on this trip, Mr. McKinney's signature and seal were placed on plans for an Advance Auto Parts store in Hopkinsville, Kentucky. [Tr., Vol. I, pp. 84-85; Compl. Ex. 6]

165. Mr. McKinney testified that he approved some projects before he went to Turkey and authorized his staff to print the plans while he was out of the office. [Tr., Vol. III, p. 95] He signed one package of 14 by 36 blue-line paper and one package of 30 by 42 blue line paper before he left on his trip. [Tr., Vol. III, p. 95] He took the appropriate seals out of the locked cabinet where they are kept so that the seals would be available to be used on these plans in his absence. [Tr., Vol. III, p. 96]

166. Mr. McKinney testified that he never directed employees to print out plans on pre-signed paper unless he had reviewed the plans first. [Tr., Vol. V, p. 83] Although Bob Wooton, a former employee of A & E Designers, Inc., testified that plans were printed on pre-signed blue-line paper without Mr. McKinney's prior review of the plans when Mr. McKinney was out of the office, the Hearing Officer does not find that testimony credible; Mr. Wooton was not in a position to know whether Mr. McKinney had reviewed the plans prior to Mr. McKinney's absence from the office.

167. The Hearing Officer finds no credible evidence in the record to support the Board's assertion that, in Mr. McKinney's absence, the pre-signed blue-line paper was used to print plans that had not been reviewed by Mr. McKinney. In addition, the Hearing Officer notes that there is no evidence in the record to indicate that engineering standards would prohibit an engineer from signing blank blue-line paper prior to the printing of sets of approved plans on the signed paper.

168. Therefore, the Hearing Officer finds that Mr. McKinney is not guilty of this charge.

D.4. Charge 7: Inappropriate Use of Logo

169. Charge 7 is that Mr. McKinney used his logo in an inappropriate manner by: (a) receiving plans from individuals who were not under Mr. McKinney's direct supervisory control, removing any identification that would be on the plans of the individual who prepared the plans, and then applying the logo of Earl F. McKinney or of A & E Designers, Inc., to create the impression that Mr. McKinney had created the plans; and (b) supplying his logo to other designers on electronic media so that those other

designers could insert his logo onto plans to create the impression that Mr. McKinney had created the plans. [Statement of Facts and Charges, ¶ 1]

170. The company logo for A & E Designers, Inc., is required to be placed on each sheet that is part of the set of final project plans that have been signed and sealed by Mr. McKinney. [Tr., Vol. V, p. 183]

171. During the time period in question, A & E Designers, Inc., was using Computer-Assisted Design (CAD) Programs. [Tr., Vol. V, p. 17]

172. A majority of the clients of A & E Designers, Inc., would e-mail drawings to A & E for review. [Tr., Vol. V, p. 17] During the time period in question, clients would send drawings to A & E by electronic transmission, from a sending computer to a receiving computer. [Tr., Vol. V, p. 18]

173. Two clients that regularly sent drawings to A & E Designers by electronic transmission were Kinko's and Holiday Inn. The drawings would be sent back and forth by electronic transmission; the party receiving the drawings would print them out, review them, make any changes to them, and send them back to the other party. This process would continue until the drawings were finalized and signed and sealed by Mr. McKinney. [Tr., Vol. V, p. 19]

174. Sometimes, after the prototype plans had been approved by Mr. McKinney, the client would print out the required number of copies of the plans for a particular site and then send the copies to Mr. McKinney for his signature and seal; these copies would be printed out with Mr. McKinney's logo on them. This was a cost-savings measure for the client. [Tr., Vol. V, p. 66]

175. There is no evidence in the record that Mr. McKinney's logo was ever placed on plans that Mr. McKinney did not help to create or did not have the necessary control over.

176. Therefore, the Hearing Officer finds that Mr. McKinney is not guilty of this charge.

D.5. Charge 8:- Signing and Sealing Incomplete Plans for Holiday Inn Express

177. Charge 8 is that Mr. McKinney signed and sealed engineering plans for a Holiday Inn Express in Dry Ridge, Kentucky, and submitted the plans to the Department of Housing, Buildings & Construction, knowing that the plumbing plans were incomplete. [Statement of Facts and Charges, ¶ F]

178. Some time prior to September 20, 1996, Mr. McKinney signed and sealed engineering plans for a Holiday Inn Express in Dry Ridge, Kentucky. The plans included 125 sheets. They were submitted to the Department of Housing, Buildings & Construction in Frankfort, Kentucky. [Tr., Vol. V, pp. 86-87, 90-91, 103]

179. The plans submitted to the Department of Housing, Buildings & Construction were complete except for two or three sheets of riser diagrams for the plumbing. [Tr., Vol. V, pp. 86-87, 103]

180. The plumbing plans for such a project are required to be sent to the regional health department for review. After the health department review, the plans are sent on by the health department to the Department of Housing, Buildings & Construction. [Tr., Vol. V, pp. 87-88]

181. Mr. McKinney testified that it was not necessary to submit the plumbing

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diagrams to the Department of Housing, Buildings & Construction at the time that the rest of the plans were submitted, because those diagrams were not necessary for that Department to begin its review of the plans. [Tr., Vol. V, pp. 90-91] The plans were sent in without the plumbing diagrams in order to start the permitting process on the plans. [Tr., Vol. V, p. 90] Mr. McKinney knew that the plumbing diagrams would be finished in a day or two and then would be sent to the regional health department for review. [Tr., Vol. V, p. 90] Mr. McKinney testified that the plans were complete for that particular submission to the Department of Housing, Buildings & Construction. [Tr., Vol. V, p. 106]

182. This Holiday Inn project was in Grant County, Kentucky. A & E Designers, Inc., sent 5 sets of plumbing plans regarding this project to the Northern Kentucky Independent District Health Department for review on September 20, 1996. [Tr., Vol. V, pp. 89-90; Resp. Exs. 18, 19] After the District Health Department approved the plumbing plans, that department sent the plans to the Department of Housing, Buildings & Construction for that Department's review. [Tr., Vol. II, p. 65; Vol. V, pp. 90, 102]

183. On September 30, 1996, the Division of Plumbing, Department of Housing, Buildings & Construction, sent Mr. McKinney a letter, stating:

We are in receipt of plans from you for the above captioned project [Holiday Inn Express, Dry Ridge, Kentucky]. We have reviewed these plans and cannot complete our review.

Please revise the riser diagram so that it is drawn in compliance with the Kentucky State Plumbing Code, and attach it to each set of plans. Also, please label openings and size all piping on the waste riser diagrams.

We are returning these plans to you NOT APPROVED which

can be resubmitted to this office upon revising the riser diagram, and we will immediately reinstitute our review.

[Compl. Ex. 10]

184. On October 11, 1996, the Division of Plumbing, Department of Housing, Buildings & Construction, sent Mr. McKinney a letter, stating:

We are in receipt of plans from you for the above captioned project [Holiday Inn Express, Dry Ridge, Kentucky]. We have reviewed these plans and cannot complete our review for the following reasons:

1. Changes and revisions were made on one of the plans to assist you in revising the other plans as noted. Please revise all other plans accordingly.
2. Please include a hub drain riser diagram for the vending area, the second and third floors drawn in compliance with the Kentucky State Plumbing Code and attach it to each set of plans.
3. The risers for "F" and "G" do not correspond with the floor plan. Please clarify which openings are for which riser.

We are returning these plans to you NOT APPROVED which can be resubmitted to this office pending completion of the above requested information, and we will reinstitute our review.

[Compl. Ex. 10]

185. It is not unusual for a permitting authority, such as the Kentucky Department of Housing, Buildings, & Construction, to send plans back with comments, changes, and corrections on the plans. [Tr., Vol. II, pp. 13-14, 16; Vol. IV, p. 48] There is no evidence in the record that such a return of plans means that Mr. McKinney submitted his plans incorrectly in the first place.

186. In sum, the Hearing Officer finds that Mr. McKinney did not submit his plans for this Holiday Inn Express incorrectly or inappropriately when he submitted the plans to the Kentucky Department of Housing, Buildings, & Construction without the 2 or 3 sheets of riser diagrams.

187. Accordingly, the Hearing Officer finds that Mr. McKinney is not guilty of this charge.

D.6. Charge 9: Applying Engineering Seal to Survey Plat

188. Charge 9 is that Mr. McKinney applied his Kentucky engineering seal to a survey plat of three lots owned by Halray, Inc., in Hopkinsville, Kentucky. [Statement of Facts and Charges, ¶ H]

189. In 1994, Mr. McKinney signed and sealed a document that is labeled both "site plan" and "survey plat." [Compl. Ex. 13]

190. This document is a boundary survey. It shows things that are commonly associated with a survey plat: the boundary of the property, some easements associated with that property, adjoining landowners, and vicinity maps. [Tr., Vol. II, p. 99; Vol. III, p. 109] This document is not a site plan, because it does not show things that typically appear on site plans: drainage or planned drainage, building pads, original contours, plus any proposed changes to the contours, or something that would identify the grading plan for a site. [Tr., Vol. II, pp. 99-100] A site plan will show the building on the site; it also will show a utility plan (water, sewer, gas, electrical) and a grading plan. [Tr., Vol. V, p. 95]

191. Although Mr. McKinney agreed that this document is a boundary survey

[Tr., Vol. III, p. 109], he later testified that he intended to use the document as a site plan so that it would not have to be reproduced. [Tr., Vol. V, p. 95] This document, however, does not show the building on the lot, which is an important part of a site plan. [Tr., Vol. V, pp. 127-130]

192. This document was part of a set of plans submitted for a Blockbuster Video store in Hopkinsville, Kentucky. The set of plans included 9 architectural sheets, 2 structural sheets, 2 mechanical sheets, and 4 electrical sheets. [Tr., Vol. V, pp. 93-94]

193. The plat survey was provided by Crawford Land Surveying of Nashville, Tennessee. Crawford Land Surveying is not a permitted surveying firm in Kentucky. The owner of that firm is James Allen Crawford, who has never been a licensed land surveyor in Kentucky. [Compl. Ex. 13; Tr., Vol. II, p. 108]

194. In Kentucky, an individual may not act as a surveyor without being registered as a surveyor. [Tr., Vol. II, p. 110]

195. In Kentucky, an individual who performs a boundary survey is required to be a registered land surveyor. [Tr., Vol. II p. 111] An engineer may sign and seal a site plan as part of a plan set, but he may not sign and seal a survey plat unless he is also a registered land surveyor. [Tr., Vol. V, p. 97]

196. Mr. McKinney is not registered as a land surveyor in Kentucky. [Tr., Vol. II, p. 111]

197. Mr. McKinney's reason for signing and sealing this boundary survey, when he is not registered as a land surveyor, is that he was signing a great number of plans, and he signed this boundary survey in error. He indicates that he unintentionally signed

and sealed the survey plat through oversight. [Tr., Vol. III, pp. 109-113] Mr. McKinney also asserts that what he should have done with this survey plat was to remove the phrase "survey plat," as well as the name and address of the surveyor, and used the document as a site plan. [Tr., Vol. V, pp. 98-99] Usually, Mr. McKinney will take a survey plat and reuse it to make the site plan. [Tr., Vol. V, p. 98]

198. Regardless of what Mr. McKinney believes he should have done with this boundary survey, the fact is that Mr. McKinney signed the boundary survey when he is not a licensed land surveyor.

199. Therefore, the Hearing Officer finds that Mr. McKinney is guilty of this charge.

III. Conclusions of Law

1. The Kentucky State Board of Licensure for Professional Engineers and Land Surveyors has jurisdiction over this matter pursuant to KRS 322.180.

2. Pursuant to KRS 13B.090(7), the burden of proof is on the Complainant, the Kentucky State Board of Licensure for Professional Engineers and Land Surveyors, to prove the charges against the Respondent, Earl F. McKinney, by a preponderance of the evidence.

3. Based on the foregoing findings of fact, the Hearing Officer concludes that the Board has proved the following charges against Mr. McKinney by a preponderance of the evidence:

a. **Category 1 of charges: Allegations of Making Untruthful Statements Connected with Practice as a Professional Engineer**

- **Charge 1(a) [C.1.c]:** Mr. McKinney made untruthful assertions in

his NCEES annual renewals for 1988 and 1989 by indicating that he was not presently then under investigation by any state, when he knew that he was under investigation by the state of Texas.

- **Charge 1(b) [C.1.d.]:** Mr. McKinney made untruthful assertions in his NCEES annual renewals for 1990, 1991, 1994, and later years, by indicating that his license had not been suspended or revoked by a state when in fact his license had been suspended.

- **Charge 2(a) [C.2.c.]:** In testimony before the Nevada Board of Professional Engineers and Land Surveyors, Mr. McKinney made untruthful statements regarding the number of states in which he was registered as an electrical engineer.

- **Charge 2(b) [C.2.d.]:** In applying for a license as an electrical engineer in California, Mr. McKinney made untruthful statements regarding the number of states in which he was licensed as an electrical engineer.

- **Charge 4 [C.4.]:** In testimony before the Nevada Board of Professional Engineers and Land Surveyors, Mr. McKinney made untruthful statements regarding the number of engineers on his staff.

b. Category 2 of charges: Allegations of signing and sealing plans inappropriately

- **Charge 5 [D.2.]:** Between 1993 and 1996, Mr. McKinney customarily signed and sealed engineering plans without having reviewed the plans first.

- **Charge 9 [D.6.]:** Mr. McKinney applied his Kentucky engineering seal to a survey plat of three lots owned by Halray, Inc., in Hopkinsville, Kentucky.

4. Based on the foregoing findings of fact, the Hearing Officer concludes that the Board has not proved the remaining charges (Charges 3, 6, 7, and 8) against Mr. McKinney by a preponderance of the evidence.

5. The Board asserts that the charges that the Board has proved against Mr. McKinney constitute violations of certain provisions of KRS 322.180 and 201 KAR

18:140 for the time period from 1989 through 1997.

6. For the relevant time period, KRS 322.180 provided, in pertinent part:

The board shall have the power to suspend, refuse to renew, or revoke the registration of any registrant, reprimand, place on probation, or fine not to exceed one thousand dollars (\$1,000), any registrant who is found guilty by the board of:

... (2) Any ... misconduct in the practice of engineering . .

;

... (4) Violation of the code of professional practice and conduct which has been adopted by the board.

7. For the relevant time period, "engineering" and the "practice of engineering" were defined in KRS 322.010(3) and (4) as follows:

(3) "Engineering" includes any service or creative work, the adequate performance of which required engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning, and design of engineering works and systems, including engineering works and systems which involve earth materials, water, other liquids, and gases, planning the use of land and waters, and the review of construction for the purpose of assuring compliance with drawings and specifications; any of which embraces such service or work either public or private, in connection with any utilities, structures, certain buildings, building systems, machines, equipment, processes, work systems, or projects with which the public welfare or the safeguarding of life, health, or property is concerned, when such professional service requires the application of engineering principles and data. It does not include the work ordinarily performed by persons who operate or maintain machinery or equipment, such as locomotive, stationary, marine, or power plant operators, nor work embraced within the practice of land surveying;

(4) "Practice of engineering" includes all professional services included in subsection (3) of this section, together

with the negotiation or solicitation for engineering work on any project in this state, regardless of whether the persons engaged in that practice are residents of this state or have their principal office or place of business in this state or any other state or country, and regardless of whether they are performing one (1) or all of these duties, or whether they are performing them in person or as the directing heads of offices of organizations[.]

8. For the relevant time period, the code of professional practice and conduct provided, in pertinent part:

201 KAR 18:140. Code of professional practice and conduct.

Section 1. The engineer or land surveyor shall conduct his practice in order to protect the public health, safety, and welfare.

Section 2. The engineer or land surveyor shall issue public statements only in an objective and truthful manner.

... Section 6. The engineer or land surveyor shall perform his services only in areas of his competence.

Section 7. The engineer or land surveyor shall not affix his signature and/or seal to any engineering or land surveying plan, plat, or document dealing with subject matter in which he lacks competence by virtue of education or experience, nor to any such plan, plat, or document not prepared by him or under his direct supervisory control.

... Section 9. The professional engineer or land surveyor shall avoid conduct likely to discredit or reflect unfavorably upon the dignity or honor of the profession.

9. The Hearing Officer will examine these statutory and regulatory provisions to determine if any of the charges that have been proved against Mr. McKinney constitute violations of these provisions.

A. Misconduct in the Practice of Engineering

10. The first statutory provision that the Board asserts that Mr. McKinney violated is KRS 322.180(2), which proscribes misconduct in the practice of engineering. The Board asserts that Mr. McKinney violated this provision by the conduct for which Mr. McKinney has been found guilty in Charges 1(a), 1(b), 5, and 9.

11. "Misconduct" is defined in *Black's Law Dictionary*, 7th ed., as "[a] dereliction of duty; unlawful or improper behavior."

12. Therefore, in order for the conduct included in Charges 1(a), 1(b), 5, or 9 to constitute misconduct in the practice of engineering, the conduct must constitute dereliction of duty, or unlawful or improper behavior, by Mr. McKinney in his practice of engineering.

13. The Hearing Officer concludes that the conduct included in Charges 1(a) and 1(b) does not constitute misconduct in the practice of engineering, because Mr. McKinney's conduct of making untruthful assertions in his NCEES annual renewal forms is not strictly within the definition of "practice of engineering" in KRS 322.010(4).

14. The Hearing Officer concludes that the conduct included in Charge 5 constitutes misconduct in the practice of engineering, because Mr. McKinney's conduct of signing and sealing engineering plans without having first reviewed the plans constitutes dereliction of duty and improper behavior in Mr. McKinney's practice of engineering. It was Mr. McKinney's duty, as a professional engineer, to review all engineering plans prior to signing and sealing those plans; Mr. McKinney's failure to perform such a review prior to signing and sealing the plans was both improper and a

dereliction of his duty as a professional engineer.

15. The Hearing Officer concludes that the conduct included in Charge 9 constitutes misconduct in the practice of engineering, because Mr. McKinney's conduct of applying his engineering seal to a survey plat constitutes dereliction of duty and improper behavior in Mr. McKinney's practice of engineering. It was Mr. McKinney's duty, as a professional engineer, to know what document he was signing and sealing, and to know whether he had the authority to sign and seal that document; thus, it was Mr. McKinney's duty, as a professional engineer, to know that his registration as a professional engineer did not authorize him to sign and seal a survey plat, and to recognize that the document that he was signing and sealing was, indeed, a survey plat. Mr. McKinney's failure to recognize that he was inappropriately signing and sealing a survey plat was both improper and a dereliction of his duty as a professional engineer.

B. Violation of the Code of Professional Practice and Conduct

16. The second statutory provision that the Board asserts that Mr. McKinney violated is KRS 322.180(4), which proscribes any violation of the Code of Professional Practice and Conduct, which was adopted by the Board at 201 KAR 18:140. There are several provisions of this Code that the Board asserts that Mr. McKinney violated. The Hearing Officer will address each of those provisions in turn.

B.1. Duty to Protect the Public Health, Safety, and Welfare

17. The Board asserts that Mr. McKinney violated Section 1 of the Code of Professional Practice and Conduct, which requires an engineer to conduct his practice in order to protect the public health, safety, and welfare. The Board asserts that Mr.

McKinney violated this provision by the conduct for which Mr. McKinney has been found guilty in Charges 5 and 9.

18. The Hearing Officer concludes that the conduct included in Charge 5 constitutes a violation of Mr. McKinney's duty to conduct his practice in order to protect the public health, safety, and welfare. By signing and sealing engineering plans without reviewing the plans first, Mr. McKinney was conducting his practice in a manner that would not protect the public health, safety, and welfare. As Mr. McKinney himself testified, the paramount duty of an engineer in reviewing plans is to protect the life and safety of the people who will be occupying the building in question, which should be accomplished by that review of the plans. If an engineer does not review the plans prior to signing and sealing the plans, the engineer cannot fulfill that duty of protecting the public health, safety, and welfare through a review of the plans.

19. The Hearing Officer concludes that the conduct included in Charge 9 does not constitute a violation of Mr. McKinney's duty to conduct his practice in order to protect the public health, safety, and welfare. There is no evidence in the record to indicate that signing and sealing a survey plat inappropriately would violate the engineer's duty to protect the public health, safety, and welfare.

B.2. Duty to Issue Public Statements in an Objective and Truthful Manner

20. The Board asserts that Mr. McKinney violated Section 2 of the Code of Professional Practice and Conduct, which requires an engineer to issue public statements only in an objective and truthful manner. The Board asserts that Mr. McKinney violated this provision by the conduct for which Mr. McKinney has been found guilty in Charges

1(a), 1(b), 2(a), 2(b), and 4.

21. "Truth" means a "fully accurate account of events; factuality." *Black's Law Dictionary*, 7th ed. "Objective" means "[o]f, relating to, or based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions." *Black's Law Dictionary*, 7th ed.

22. The Hearing Officer concludes that the conduct included in Charges 1(a), 1(b), 2(a), 2(b), and 4 constitutes a violation of Mr. McKinney's duty to issue public statements only in an objective and truthful manner: In these charges, Mr. McKinney was found guilty of making untruthful assertions in his NCEES annual renewals, in testimony before the Nevada Board of Professional Engineers, and in his applications for licensure in California. All of these assertions by Mr. McKinney were public assertions, made in records that would be provided to public agencies and at a public hearing. In addition, all of these assertions by Mr. McKinney were not truthful, because they were not accurate; neither were Mr. McKinney's assertions objective, because they were not based on verifiable information that was available to Mr. McKinney. Making these assertions constitutes a violation of this Code provision.

B.3. Duty to Perform Services Only in Areas of Competence

23. The Board asserts that Mr. McKinney violated Section 6 of the Code of Professional Practice and Conduct, which requires an engineer to perform his services only in areas of his competence. The Board asserts that Mr. McKinney violated this provision by the conduct for which Mr. McKinney has been found guilty in Charge 9.

24. The Hearing Officer concludes that the conduct included in Charge 9

constitutes a violation of Mr. McKinney's duty to perform his services only in areas of his competence. In Charge 9, Mr. McKinney was found guilty of applying his engineering seal to a survey plat, when Mr. McKinney was not qualified or registered as a land surveyor. By such action, Mr. McKinney clearly was performing his services in an area outside of the areas of his competence.

B.4. Duty Regarding Affixing Signature and Seal to Engineering Plan

25. The Board asserts that Mr. McKinney violated Section 7 of the Code of Professional Practice and Conduct, which requires an engineer to not affix his signature and/or seal to any plan, plat, or document dealing with subject matter in which the engineer lacks competence by virtue of education or experience, nor to any such plan, plat, or document not prepared by the engineer or under the engineer's direct supervisory control. The Board asserts that Mr. McKinney violated this provision by the conduct for which Mr. McKinney has been found guilty in Charges 5 and 9.

26. The Hearing Officer concludes that the conduct included in Charge 5 does not constitute a violation of the duty articulated in this section of the Code. Although the Hearing Officer has found Mr. McKinney guilty of the conduct in Charge 5 of signing and sealing engineering plans without having reviewed the plans first, there is no finding in that charge that Mr. McKinney affixed his signature and seal to a plan that he was not competent to sign and seal. Neither is there any finding that Mr. McKinney affixed his signature and seal to a plan that was not prepared either by Mr. McKinney or under Mr. McKinney's direct supervisory control.

27. The Hearing Officer concludes that the conduct included in Charge 9

constitutes a violation of Mr. McKinney's duty not to affix his signature and seal to any plan with a subject matter in which the engineer lacks competence. In Charge 9, Mr. McKinney was found guilty of applying his engineering seal to a survey plat, when Mr. McKinney did not have competence in the area of land surveying. This conduct constitutes a violation of this Code provision.

28. The Hearing Officer concludes that Mr. McKinney has not been found guilty of any charge that alleges that Mr. McKinney signed and sealed a document not prepared by Mr. McKinney or under Mr. McKinney's direct supervisory control. Therefore, there is no need to address Mr. McKinney's motion to dismiss the charges concerned with the phrase "direct supervisory control."

B.5. Duty to Avoid Conduct Likely to Discredit or Reflect Unfavorably Upon the Dignity or Honor of the Profession

29. The Board asserts that Mr. McKinney violated Section 9 of the Code of Professional Practice and Conduct, which requires an engineer to avoid conduct likely to discredit or reflect unfavorably upon the dignity or honor of the profession. The Board asserts that Mr. McKinney violated this provision by the conduct for which Mr. McKinney has been found guilty in Charges 1(a), 1(b), 5, and 9.

30. The Hearing Officer concludes that the conduct in all of these charges constitutes a violation of Mr. McKinney's duty to avoid conduct likely to discredit or reflect unfavorably upon the dignity or honor of the profession. As discussed above, all of the conduct included in these charges was found to violate a statutory provision as well as at least one section of the Code of Professional Practice and Conduct. Conduct that violates these statutory and regulatory provisions will naturally reflect unfavorably

upon the dignity or honor of the profession.

C. Summary of Conclusions of Law Regarding Charges

31. In sum, the Hearing Officer concludes that the charges that have been proved against Mr. McKinney constitute statutory and regulatory violations as follows:

- **Misconduct in the Practice of Engineering [KRS 322.180(2)]**
 - **Charge 5:** Between 1993 and 1996, Mr. McKinney customarily signed and sealed engineering plans without having reviewed the plans first.
 - **Charge 9:** Mr. McKinney applied his Kentucky engineering seal to a survey plat of three lots owned by Halray, Inc., in Hopkinsville, Kentucky.
- **Violations of the Code of Professional Practice and Conduct [KRS 322.180(4) and 201 KAR 18:140]**
 - **Violation of the Duty to Protect the Public Health, Safety, and Welfare [201 KAR 18:140, Section 1]**
 - **Charge 5:** Between 1993 and 1996, Mr. McKinney customarily signed and sealed engineering plans without having reviewed the plans first.
 - **Violation of the Duty to Issue Public Statements in an Objective and Truthful Manner [201 KAR 18:140, Section 2]**
 - **Charge 1(a):** Mr. McKinney made untruthful assertions in his NCEES annual renewals for 1988 and 1989 by indicating that he was not presently then under investigation by any state, when he knew that he was under investigation by the state of Texas.
 - **Charge 1(b):** Mr. McKinney made untruthful assertions in his NCEES annual renewals for 1990, 1991, 1994, and later years, by indicating that his license had not been suspended or revoked by a state when in fact his license had been suspended.
 - **Charge 2(a):** In testimony before the Nevada Board of Professional Engineers and Land Surveyors, Mr. McKinney made untruthful statements regarding the number of states in which he

was registered as an electrical engineer.

- **Charge 2(b):** In applying for a license as an electrical engineer in California, Mr. McKinney made untruthful statements regarding the number of states in which he was licensed as an electrical engineer.
- **Charge 4:** In testimony before the Nevada Board of Professional Engineers and Land Surveyors, Mr. McKinney made untruthful statements regarding the number of engineers on his staff.
- **Violation of the Duty to Perform Services Only in Areas of Competence [201 KAR 18:140, Section 6]**
 - **Charge 9:** Mr. McKinney applied his Kentucky engineering seal to a survey plat of three lots owned by Halray, Inc., in Hopkinsville, Kentucky.
- **Violation of the Duty to Avoid Conduct Likely to Discredit or Reflect Unfavorably Upon the Dignity or Honor of the Profession [201 KAR 18:140, Section 9]**
 - **Charge 1(a):** Mr. McKinney made untruthful assertions in his NCEES annual renewals for 1988 and 1989 by indicating that he was not presently then under investigation by any state, when he knew that he was under investigation by the state of Texas.
 - **Charge 1(b):** Mr. McKinney made untruthful assertions in his NCEES annual renewals for 1990, 1991, 1994, and later years, but indicating that his license had not been suspended or revoked by a state when in fact his license had been suspended.
 - **Charge 5:** Between 1993 and 1996, Mr. McKinney customarily signed and sealed engineering plans without having reviewed the plans first.
 - **Charge 9:** Mr. McKinney applied his Kentucky engineering seal to a survey plat of three lots owned by Halray, Inc., in Hopkinsville, Kentucky.

D. Motion to Dismiss Charges Concerning Other States

32. Mr. McKinney has submitted a Motion for Directed Verdict, which is

essentially a motion to dismiss, regarding any charges that concern a specific act that took place in another state or that concern Mr. McKinney's signing and sealing plans for projects that were located in other states. Although Mr. McKinney is not very specific about the exact charges that he is referencing in this motion, the Hearing Officer concludes that those charges are the charges that concern Mr. McKinney's Nevada testimony [Charges 2(a), 2(b), and 4] and the charge that concerns Mr. McKinney signing and sealing engineering plans without reviewing the plans first [Charge 5].⁷

33. Mr. McKinney's first argument in support of this motion is an argument of statutory construction, in which he asserts that the language of KRS 322.010(4) indicates that the legislature intended for the Board to regulate the practice of engineering only within the Commonwealth of Kentucky. The Hearing Officer will not discuss this argument in any detail, because this argument has already been addressed and rejected by the Kentucky Court of Appeals in *McKinney v. Kentucky State Board of Registration for Professional Engineers and Land Surveyors*, Ky. App., 93-CA-001561-MR, which is an earlier version of this same dispute between the parties.

In that decision, the Court of Appeals stated:

States can exercise their police power in matters affecting the safety, welfare, comforts and conveniences of their citizens. . . . And, states have the authority to regulate occupations and professions where the safety and welfare of the public are concerned. . . . Therefore, even if [Mr. McKinney] was

⁷The Hearing Officer notes that, while 98-99% of the engineering plans connected with Charge 5 were for projects that were located in states other than Kentucky, 1-2% of the engineering plans connected with this charge were for projects that were located within Kentucky. Even though the number of engineering plans for projects in Kentucky is a relatively small number, the fact remains that Mr. McKinney has been found guilty of signing and sealing those plans without first reviewing the plans.

approving only projects located outside the state, if such approval involved unsafe projects, Kentucky has an obligation to protect not only its citizens, but to prevent unsafe actions by its citizens, if such actions affect out-of-state citizens.

Accordingly, we hold that under the language of KRS 322.080 and KRS 322.010(3)(4), the Board has the authority to initiate a disciplinary action against [Mr. McKinney] for his practice of engineering as it related to projects outside the state of Kentucky.

Id. at p. 8 [citations omitted]. Thus, the Hearing Officer concludes that the Court of Appeals has already decided this issue regarding the interpretation to be given to the Board's statutory authority to bring these charges against Mr. McKinney. [For the Board's easy reference, the Hearing Officer is attaching a copy of this decision by the Court of Appeals as Attachment 2.]

34. Mr. McKinney's second argument in support of this motion is that the recent Kentucky Supreme Court case of *Union Underwear Co., Inc. v. Barnhart, Ky.*, 50 S.W.3d 188 (2001), mandates the result requested by Mr. McKinney. The Hearing Officer disagrees.

In *Barnhart*, the Kentucky Supreme Court determined that the Kentucky Civil Rights Act cannot be applied outside Kentucky. The Court found that the only connection to Kentucky of this lawsuit alleging age discrimination was that the employer had its headquarters in Kentucky; the employee had no connection with Kentucky, and the alleged discrimination occurred either in South Carolina or Alabama.

The Hearing Officer concludes that the *Barnhart* case is distinguishable from this instant case involving the Board and Mr. McKinney. In the *Barnhart* case, a private

individual was suing a private company for alleged discrimination. In the instant case, a state agency that regulates the practice of engineering is bringing an action against one of the individuals whom it has licensed and whose license it has the authority to regulate. In the *Barnhart* case, the private individual had no connection with Kentucky, and the alleged discrimination did not occur in Kentucky. In the instant case, both Mr. McKinney and the Board are connected to Kentucky; Mr. McKinney's main office is located in Lexington, Kentucky, and the Board is a Kentucky state agency. In the *Barnhart* case, the private individual was suing the private corporation to remedy alleged misconduct performed by the private corporation against the private individual. In the instant case, the Board is exercising its duty to the public to ensure that individuals who are licensed to practice engineering in Kentucky meet the requisite requirements and standards of professional engineers in Kentucky.

The Hearing Officer concludes that, because there are so many differences between the *Barnhart* case and the instant case, the holding in the *Barnhart* case is not applicable to the charges brought against Mr. McKinney by the Board in the instant case.

For all of these reasons, the Hearing Officer concludes that Mr. McKinney's motion to dismiss these charges should be and is denied.

E. Assessment of Appropriate Sanction

35. In determining the appropriate sanction for the charges for which Mr. McKinney has been found guilty, the Hearing Officer has considered the nature of the charges for which Mr. McKinney has been found guilty. Contrary to Mr. McKinney's assertion that many of these charges are "form over substance," the Hearing Officer

concludes that the charges for which Mr. McKinney has been found guilty are of a very serious nature and go to the very essence of practicing as a professional engineer.

36. The Hearing Officer has also considered the number of charges for which Mr. McKinney has been found guilty. This is not a situation in which an individual has been found guilty of an isolated, non-recurring incident. The charges for which Mr. McKinney has been found guilty often involve recurring incidents of the same type of conduct.

37. In addition, the Hearing Officer has considered the fact that some of the charges for which Mr. McKinney has been found guilty in this case are similar to charges for which Mr. McKinney was found guilty in previous proceedings in other states. Specifically, the Hearing Officer notes that:

- Mr. McKinney was found guilty in 1989 in Texas of erroneously sealing and stamping outside his discipline on two occasions with respect to surveys;
- Mr. McKinney was found guilty in 1989 in Texas of representing to the Board in a letter that he had Texas licensed engineers on his staff who were proficient in civil and structural engineering, and that he had a qualified soils investigation analyst on his staff, but, during his testimony, not remembering who those staff members were and not wanting time to determine the answer; and
- Mr. McKinney was found guilty in 1997 in Nevada of stamping and signing plans that involved electrical engineering when Mr. McKinney was not licensed to practice electrical engineering in Nevada.

The Hearing Officer concludes that the repeat nature of the similar charges in the

instant case indicates that Mr. McKinney has previously not understood the significance of the charges for which he has been found guilty.

38. The Hearing Officer concludes that the serious nature of the charges, the number of the charges, and the repeat nature of some of the charges for which Mr. McKinney has been found guilty all combine to indicate that Mr. McKinney's license as a professional engineer should be suspended for five (5) years, and that Mr. McKinney should be required to pay a fine of \$1,000. In addition, the repeat nature of some of the charges, and Mr. McKinney's attitude that some of these matters are not very important, indicate that Mr. McKinney should be required to receive Board-approved training regarding the Code of Professional Practice and Conduct before his license is reinstated.

IV. Recommended Order

Based on the foregoing findings of fact and conclusions of law, the Hearing Officer recommends that the Kentucky State Board of Licensure for Professional Engineers and Land Surveyors issue an Order that finds the Respondent, Earl F. McKinney, guilty of violating KRS 322.180 in the manner outlined above.

The Hearing Officer also recommends that the Kentucky State Board of Licensure for Professional Engineers and Land Surveyors issue an Order as follows:

1. Mr. McKinney's license as a professional engineer shall be suspended for a period of five (5) years, from the date on which the Board's Order is served upon Mr. McKinney.
2. Mr. McKinney shall pay a fine to the Kentucky State Board of Licensure for Professional Engineers and Land Surveyors in the amount of \$1,000.00.

3. Mr. McKinney's license as a professional engineer shall not be reinstated until Mr. McKinney requests reinstatement of his license and demonstrates that he has paid the assessed fine in full and that he has completed 12 hours of Board-approved training regarding the Code of Professional Practice and Conduct.

V. Notice of Exceptions and Appeal Rights

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Kentucky State Board of Registration for Professional Engineers and Land Surveyors.

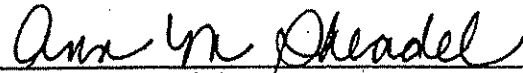
The final Order of the Kentucky State Board of Registration for Professional Engineers and Land Surveyors may be appealed pursuant to KRS 13B.140(1), which states:

All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

Pursuant to KRS 23A.010(4), "Such review [by the Circuit Court] shall not constitute an appeal but an original action." Some courts have interpreted this language to mean

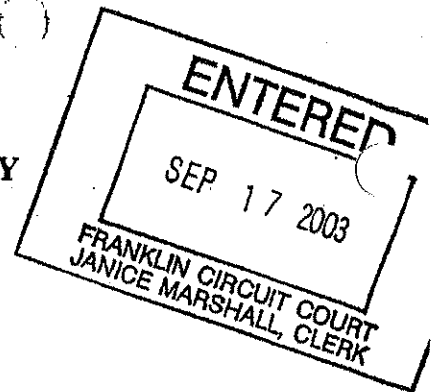
that a summons must be served upon filing an appeal in Circuit Court.

SO RECOMMENDED this 3rd day of May, 2002.



Ann M. Sheadel
Chief Hearing Officer
Division of Administrative Hearings
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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 02-CI-00905



EARL F. McKINNEY

PETITIONER

v.

OPINION AND ORDER

KENTUCKY STATE BOARD OF
LICENSURE FOR PROFESSIONAL
ENGINEERS AND LAND SURVEYORS

RESPONDENT

* * * * *

This matter is before the Court upon the Petitioner's, Earl F. McKinney ("McKinney"), appeal from the Respondent's, Kentucky State Board of Licensure for Professional Engineers and Land Surveyors ("Board"), Final Order revoking McKinney's license.

This Court has considered the parties' arguments and reviewed the record, memoranda, and applicable law. The Court now AFFIRMS the Board's Order.

INTRODUCTION

Earl F. McKinney has been registered or licensed as a professional engineer in the Commonwealth of Kentucky since April 21, 1964. He has also obtained professional engineer status in 48 other states through reciprocity. He is President of A & E

Designers, Inc., which has its main office in Lexington, Kentucky. He specializes in repeat projects involving prototype plans for restaurants, hotels and retail stores.

AS CLERK OF THE FRANKLIN CIRCUIT/DISTRICT
COURT, I DO CERTIFY THAT THIS IS A TRUE
& CORRECT COPY OF THE ORIGINAL ENTERED
RECORD IN MY OFFICE. IN TESTIMONY
WHEREOF WITNESS MY HAND THIS 24
DAY OF Feb. 2004
BY: Janice Marshall, CLERK
D.C.

Almost all of McKinney's practice involves projects that are physically located outside of the Commonwealth of Kentucky.

The Board brought nine charges against McKinney essentially alleging, among other items, that he routinely signed and sealed engineering plans for 'repeat projects' without adequate review. The Hearing Officer found McKinney guilty of five of the charges. The Board adopted the Hearing Officer's Order and revoked McKinney's license to practice engineering in the Commonwealth of Kentucky.

McKinney filed this appeal arguing that the Board's final order was not supported by substantial evidence on the record and that the sanction imposed was an abuse of its discretion in violation of KRS Section 13B.150 (2). This Court disagrees with McKinney and AFFIRMS the Board's Final Order.

DISCUSSION

When this Court is presented with an appeal from an administrative agency, the Court's function is to ensure that the agency did not act arbitrarily in that its decision is based on substantial evidence of fact in the record and that it did not apply the wrong rule of law. *Kentucky Unemployment Insurance Comm'n v. King*, Ky. App., 657 S.W.2d 250 (1983). Evidence is substantial if "when taken alone or in light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men."

Kentucky Racing Comm'n v. Fuller, Ky., 481 S.W.2d 298, 308 (1972) (citing *Blankenship v. Lloyd Blankenship Coal Co.*, 463 S.W.2d 62 (1970)). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an

COMMONWEALTH OF KENTUCKY
KENTUCKY STATE BOARD OF LICENSURE FOR
PROFESSIONAL ENGINEERS AND LAND SURVEYORS

ADMINISTRATIVE ACTION NO. 98-KBELS-0163

KENTUCKY STATE BOARD OF LICENSURE FOR
PROFESSIONAL ENGINEERS AND LAND SURVEYORS PETITIONER

VS: **FINAL ORDER**

EARL F. McKINNEY, PE #5580 RESPONDENT

The Board having considered the entire Record in this proceeding, including, but not limited to various motions by the parties, the Trial Transcript, exhibits introduced into evidence, and the Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order, and being sufficiently advised, it is the **FINAL ORDER** of this Board that the Hearing Officer's Findings of Fact and Conclusions of Law are **ADOPTED** as a part of this Board's Final Order as if fully set out herein. It is further **ORDERED** that Earl F. McKinney's license to practice engineering in the Commonwealth of Kentucky be **REVOKED**.


This Final Order of the Kentucky State Board of Licensures for Professional Engineers and Land Surveyors may be appealed pursuant to KRS 13B.140(1), which states:

EXHIBIT A

"All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

Pursuant to KRS 23A.010(4), "Such review [by the Circuit Court] shall not constitute an appeal but an original action."

WITNESS my hand this the 11 day of July, 2002.



JAMES B. RINEY, PE, PLS, CHAIRMAN
KENTUCKY STATE BOARD OF LICENSURE FOR
PROFESSIONAL ENGINEERS AND LAND SURVEYORS

ENTERED, this the 16 day of July, 2002.



B. David Cox, Executive Director

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Final Order has been hand delivered to Robert W. Fentress, Kentucky State Board of Licensure for Profession Engineers and Land Surveyors, for entry; and mailed via U.S. Mail, Certified, Return Receipt Requested, to the persons named below, this the 16th day of July, 2002.

Hon. Ann M. Sheadel, Chief Hearing Officer
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Attorney at Law
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Hon. Peter L. Ostermiller
Attorney at Law
239 South Fifth Avenue, Suite 500
Louisville, Kentucky 40202



B. David Cox, Executive Director
Kentucky State Board of Licensure for
Professional Engineers and Land Surveyors

administrative agency's findings from being supported by substantial evidence". *Fuller* at 307.

The Board Did Not Give Extra-territorial Application of Its Authority

McKinney argues that the Board only has the power to regulate his practice of engineering as it applies to projects within the Commonwealth of Kentucky. However, the Court of Appeals specifically rejected McKinney's argument in the case of *Earl F. McKinney vs. Board*, Ky. App. No. 93-CA-1561-MR. The Court held "that under the language of KRS 322.080 and KRS 322.010(3)(4), the Board has the authority to initiate a disciplinary action against the appellant for his practice of engineering as it related to projects outside the state of Kentucky." *Id. at p.8.*

McKinney argues that *Union Underwear Co., Inc. v. Barnhart*, Ky., 50 S.W.3d 188 (2001), overturned the previous decision by the Court of Appeals. However, the two cases are easily distinguishable. *Union* involves a private individual with no connection to Kentucky alleging discrimination by a private company as a result of conduct which occurred either in South Carolina or Alabama. The only connection to Kentucky was that the employer had its headquarters in Kentucky. In contrast, the case at hand involves a state agency regulating a professional engineer licensed by Kentucky. Furthermore, the actual conduct, practicing engineering, occurred within the Commonwealth of Kentucky.

Evidence Obtained from Bobby Wooton was Properly Admitted

Bobby Wooton worked for A&E from 1990 until 1997. During that period he

collected various company documents which were later introduced as evidence against McKinney. McKinney believes Wooton's conduct was improper and argues that any evidence obtained by Wooton should have been suppressed by the Hearing Officer.

However, Courts have routinely held that improperly obtained evidence need not be excluded unless the government was somehow involved in the improper conduct.

Burdeau v. McDowell, 256 U.S. 465 (1921); *U.S. v. Jacobson*, 466 U.S. 109 (1984).

McKinney offered no evidence to the Hearing Officer tending to show that the Board was involved in Wooton's conduct. Thus, there was no basis for suppressing the evidence Wooton obtained.

There was Substantial Evidence Supporting the Board's Final Order

First, the record contains substantial evidence that McKinney made false representations on his National Council of Examiners for Engineers & Surveyors renewal forms. He marked that his license had not been suspended by a state, nor was he under investigation by a state. However, the record shows that his license had been suspended by multiple states.

Second, the record contains substantial evidence that McKinney made false representations regarding his licensure as an electrical engineer. In testimony before the Nevada Board of Professional Engineers and Land Surveyors, and in his application for licensure as an electrical engineer in California, McKinney inflated the number of states in which he was licensed as an electrical engineer. He misrepresented his qualifications.

Third, the record contains substantial evidence that McKinney gave false

testimony before the Nevada Board as to the number of engineers employed by A&E. He stated that A&E employed nine different engineers. In truth, A&E only had three engineers including McKinney.

Fourth, there is substantial evidence that McKinney certified a survey plat although he is not a professional land surveyor. McKinney testified that he inadvertently stamped the plat. Nonetheless, the fact that he certified the plat due to his negligence does not exempt him from punishment by the Board.

Finally, there was substantial evidence that McKinney did not adequately review the plans he certified. Bobby Wooton, a former A&E employee, testified that he had personal knowledge that many plans would be signed and certified without any review. The fact that McKinney improperly stamped a survey plat bolsters the Board's findings that he was not conducting adequate reviews. According to the testimony, McKinney did not have enough hours in the year to conduct appropriate plan reviews necessary to protect the public health, safety and welfare.

The Penalty Assessed by the Board was Not an Abuse of its Discretion

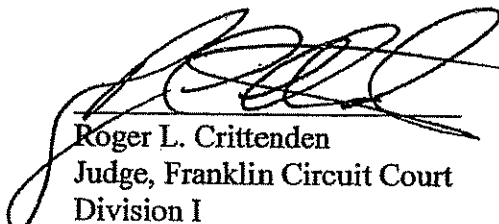
In KRS 322.180, the legislature granted the Board a wide range of penalties that may be imposed upon licensees. Revocation of a license is one of the options. Even if this Court believed a lesser penalty would have been sufficient, the Court does not have the authority to change the penalty assessed by the Board unless it was arbitrary and capricious, or a clear abuse of discretion. *City of Louisville v. Milligan*, Ky., 798 S.W.2d 454 (1990). The Board is responsible for protecting the public against negligent

workmanship which may lead to defective engineering plans. Here, the Board obviously felt that, based upon the extent of the misrepresentations and the numerous plans inadequately reviewed, it was appropriate to revoke McKinney's engineering license. In doing so, it did not act outside the scope of its authority.

CONCLUSION

For these reasons, the Board's decision is **AFFIRMED**. The Circuit Clerk shall serve notice of this Order pursuant to CR 77.04. There being no just cause for delay, this is a final and appealable Order.

SO ORDERED this 16 day of September, 2003.



Roger L. Crittenden
Judge, Franklin Circuit Court
Division I

DISTRIBUTION:

Hon. Peter L. Ostermiller
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239 South Fifth Street
Louisville, KY 40202

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Hon. B.R. Salyer
General Counsel
Kentucky Engineering Center
160 Democrat Drive
Frankfort, KY 40601

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2003-CA-002555-MR

EARL F. MCKINNEY

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
ACTION NO. 02-CI-00905

KENTUCKY STATE BOARD OF REGISTRATION,
(FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS)

APPELLEE

ORDER DENYING
EMERGENCY RELIEF

*** **

BEFORE: COMBS, DYCHE AND SCHRODER, JUDGES.

This matter is before the Court on the appellant's motion for emergency relief seeking to stay enforcement of the circuit court judgment affirming the Board's revocation of his engineering license. Having considered the motion and carefully reviewed the final order entered by the circuit court, the Court ORDERS that the motion for emergency relief be, and it is hereby, DENIED. Considering the serious violations found by the Board and affirmed by the circuit court and considering the delay in seeking a stay of the enforcement of the circuit court

judgment, the appellant has not presented grounds to justify the granting of an emergency stay.

The motion for intermediate relief will be considered by a panel of this Court in accordance with the normal practice of the Court when the response time provided by the Civil Rules has run.

ENTERED: _____

DEC 30 2003

Law Combs

JUDGE, COURT OF APPEALS

Commonwealth of Kentucky

Court of Appeals

NO. 2003-CA-002555-MR

EARL F. MCKINNEY

APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
v. ACTION NO. 02-CI-00905

KENTUCKY STATE BOARD OF REGISTRATION,
FOR PROFESSIONAL ENGINEERS AND LAND
SURVEYORS

APPELLEES

ORDER DENYING INTERMEDIATE RELIEF

* * * * *

BEFORE: DYCHE, SCHRODER, AND VANMETER, JUDGES.

This matter is before the Court on the appellant's motion for intermediate relief seeking to stay the enforcement of the revocation of his engineering license. The revocation ordered by the Board was stayed by the circuit court pending review in that court. The circuit court's stay expired with the entry of its Opinion and Order affirming the Board's action.

Having reviewed the motion and the response thereto, this Court is of the opinion that the appellant has not set out sufficient grounds to believe that he will be successful on his appeal or that he will suffer irreparable injury if relief is

not granted. The circuit court decision cites a pattern of lack of due care in the practice of the profession which supports the enforcement of the revocation while this appeal proceeds. As the Board's response indicates, the business of the appellant's firm can continue under the supervision of another licensed engineer.

Accordingly, the Court ORDERS that the appellant's motion for intermediate relief be, and it is hereby, DENIED.

ENTERED: IAN 29 2004

Wil Schroder
JUDGE, COURT OF APPEALS

RENDERED: APRIL 22, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002555-MR

EARL F. MCKINNEY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 02-CI-00905

KENTUCKY STATE BOARD OF REGISTRATION
FOR PROFESSIONAL ENGINEERS
AND LAND SURVEYORS

APPELLEE

OPINION AFFIRMING

** ** *

BEFORE: DYCHE, KNOPF, AND TACKETT; JUDGES.

TACKETT, JUDGE: Earl McKinney (McKinney) appeals from a decision by the Kentucky State Board of Licensure for Professional Engineers and Land Surveyors (Board) which revoked his engineering license in the Commonwealth. McKinney claims that the Board exceeded its authority in revoking his license for his alleged negligence in reviewing engineering projects

from other states in which he is also a licensed engineer.

Since the actual review work took place in Kentucky, we agree with the Board that McKinney was negligently practicing engineering in the Commonwealth and uphold the Board's decision revoking his license.

McKinney has been a licensed professional engineer in the Commonwealth since 1964. Through reciprocity, he also holds engineering licenses in forty-eight other states. At the time the Board revoked his license, most of McKinney's work consisted of reviewing prototype plans for restaurant chains, hotels and retail stores. He was the president of A & E Designers, Inc. which had its main office in Lexington, Kentucky. Nevertheless, most of the plans which he reviewed were for projects located in other states, and McKinney would sign them under the seal for the state in which the projects were to be built.

The Board brought nine allegations of negligence against McKinney and the Hearing Officer found him guilty of five. The allegations were based on his habit of signing and sealing projects with inadequate review, unauthorized sealing of a land survey plat, and making false representations on his National Council of Examiners for Engineers & Surveyors (NCEES) license renewal forms. The Board accepted the Hearing Officer's findings and revoked McKinney's license. McKinney appealed the

decision to the Franklin Circuit Court which upheld the Board's decision. This appeal followed.

On appeal, McKinney argues that the Board improperly exercised extraterritorial authority in examining his work on projects located outside the Commonwealth and sealed with engineering licenses from other states. He also claims that the Board had insufficient evidence to determine that he was guilty of the charges of negligence against him. Specifically, McKinney brings up the Board's findings that he spent insufficient time reviewing plans, that he was untruthful on his NCEES forms, that he misrepresented the number of states in which he was a licensed electrical engineer, and that his statement regarding the number of engineers he employed was untrue. Finally, McKinney contends that revocation of his license was an excessive sanction as a matter of law.

In reviewing an appeal from an administrative agency, our function is to ensure that the agency did not act arbitrarily. We must review the Board's decision to determine whether it was supported by substantial evidence and whether the Board applied the correct rule of law. Kentucky Unemployment Insurance Comm'n v. King, 657 S.W.2d 250 (Ky.App. 1983). Substantial evidence is evidence that has "sufficient probative value to induce conviction in the minds of reasonable men." Kentucky Racing Comm'n v. Fuller, 481 S.W.2d 298, 308 (Ky.

1972). Even if the evidence would support differing conclusions, it may be sufficient to support an agency's decision.

McKinney's first argument is that Board lacked authority to regulate his practice of engineering related to projects outside the Commonwealth. In support of this argument, he cites a decision by the Kentucky Supreme Court, Union Underwear Company, Inc. v. Barnhart, 90 S.W.3d 188 (Ky. 2001), overturning our decision which would have allowed an employee to sue Union Underwear in Kentucky where the company is headquartered. The employee had no connection to Kentucky, and the alleged conduct occurred in either Alabama or South Carolina. Barnhart is easily distinguishable from the facts at hand. In this case, the Board is regulating the conduct of an engineer licensed in the Commonwealth. Moreover, McKinney's acts in the practice of engineering actually occurred in Kentucky. Consequently, the Board did not overstep its authority to regulate McKinney's conduct in reviewing plans for out-of-state projects.

McKinney next argues that the Hearing Officer engaged in speculation to reach a determination that he spent insufficient time reviewing engineering plans. The Hearing Officer made a finding that it would have been impossible for McKinney to review all of the plans that he signed and sealed.

McKinney testified that approximately 1,000 projects came into A & E's office each year. Of those, he stated that "in the neighborhood" of 60% to 70% were plans which he would sign. McKinney now claims that the Hearing Officer's finding that he could not adequately review all the plans he signed and sealed rests on speculation. However, this discounts additional evidence introduced by Bob Wooten, a former employee of A & E. Wooten testified that he had personal knowledge that McKinney would sign and seal plans the same day that he received them and without conducting a review. Moreover, there was evidence that McKinney accidentally signed and sealed a survey plat even though he was not a professional surveyor and, thus, not authorized to do so. We are unable to say that the Board had insufficient evidence upon which to base its finding that McKinney conducted insufficient reviews of engineering plans that he signed and sealed.

The remaining evidentiary issues deal with McKinney's alleged misrepresentations regarding the status of his license, the number of states in which he was licensed as an electrical engineer, and the number of engineers he employed. McKinney filled out NCEES renewal forms indicating that his license was not suspended in any state, nor was he under investigation by any state. There was evidence that McKinney had been suspended by a number of states and that, in Texas, he had formal

disciplinary charges pending. McKinney argues that, since some of the suspensions were probated, he could not have known that he needed to include that information on his NCEES forms.

Moreover, the Texas disciplinary charges were filed at the conclusion of that state's investigation, so McKinney argues he was technically no longer under investigation. Despite these contentions, McKinney fails to persuade us that the Board had insufficient evidence to support its finding that he was untruthful in filling out his NCEES forms.

McKinney also claims that the Board erred in finding that he misrepresented the number of states in which he was an electrical engineer and the number of engineers he employed. He contends that statements regarding the number of states in which he was licensed as an electrical engineer were made in good faith. McKinney inflated the number of states in which he had such a licensed specialty in testimony to the Nevada Board of Professional Engineers and Land Surveyors and in his application to be licensed as an electrical engineer in California.

Moreover, in his Nevada testimony, McKinney stated that he employed three engineers each in structural, electrical, and mechanical engineering. In truth, McKinney employed a total of three engineers, including himself. He now argues that his statements as to the number of engineers he employed was a matter of opinion rather than an untruthful statement. We

disagree. There was substantial evidence to support the Board's findings that McKinney made untruthful representations regarding his licensure as an electrical engineer and the number of engineers he employed.

Finally, McKinney argues that the penalty determined by the Board was excessive as a matter of law. He points out that there was no evidence that any of the plans he signed and sealed contained defects which might have posed a risk to the public health or safety. Kentucky Revised Statute 322.180 provides a wide range of penalties which the Board can impose on licensed engineers. We do not have the authority to change the penalty assessed by the Board unless it was arbitrary or capricious or constituted a clear abuse of discretion. City of Louisville v. Milligan, 798 S.W.2d 454 (Ky. 1990). The Board had the authority to revoke McKinney's license due to the numerous misrepresentations regarding his license and his practice of signing and sealing plans without an adequate review. The fact that McKinney's procedures for reviewing plans allowed him to inadvertently sign and seal a land survey plat is but one example of the lack of review he engaged in. The Board was not obligated to wade through the numerous plans certified by McKinney in an effort to point out hazards in the designs.

For the foregoing reason, the decision of the Kentucky State Board of Licensure for Professional Engineers and Land

Surveyors revoking McKinney's Kentucky license as an engineer is affirmed.

DYCHE, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS WITH SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING: I concur in most of the reasoning and the result reached by the majority. However, with respect to the Board's sanctioning of McKinney for misconduct in reviewing engineering plans for out-of-state projects, I do so based primarily on the history of this case and these parties. In 1992, the Board brought an administrative action against McKinney alleging most of the same type of misconduct as it asserted in this action. McKinney argued then, as he argues now, that the Board lacked jurisdiction and statutory authority to initiate any discipline proceeding against him based upon conduct involving engineering projects outside of Kentucky.

In an unpublished opinion, this Court disagreed.¹ The prior panel of this Court noted that KRS 322.180 authorizes the Board to regulate the practice of engineering within Kentucky. After considering the definitions of "engineering" and "the practice of engineering" contained in KRS 322.010(3) & (4), this Court concluded that the Board is authorized to regulate all engineering work that takes place within Kentucky, even if it

¹ Earl F. McKinney v. Kentucky State Board of Registration for Professional Engineers and Land Surveyors, No. 93-CA-001561-MR (Not-to-be-Published Opinion rendered June 24, 1994).

involves projects outside of Kentucky and is under the authority of another state's professional license.

Were we considering this matter on a clean slate, I might reach a different conclusion. Nevertheless, the issue of the Board's jurisdiction was fully litigated in the prior action. Therefore, McKinney is precluded from re-litigating that matter.² Furthermore, as the majority correctly points out, Union Underwear Co. Inc. v. Barnhart,³ does not alter this result. In Union Underwear, the Kentucky Supreme Court held that the Kentucky Civil Rights Act cannot have extraterritorial application to conduct which occurred entirely outside of Kentucky. In this case, McKinney's acts in the practice of engineering actually occurred in Kentucky. As a practical matter I believe the Board should defer disciplinary action to the licensing bodies in the appropriate jurisdictions, but I agree with the majority that the Board had subject matter jurisdiction in this case.

BRIEF FOR APPELLANT:

Peter L. Ostermiller
Robert L. Abell
Louisville, Kentucky

BRIEF FOR APPELLEE:

B. R. Salyer
Frankfort, Kentucky

² See Sedley v. City of West Buechel, 461 S.W.2d 556 (Ky. 1970).

³ 50 S.W.3d 188 (Ky. 2001).

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-002555-MR

EARL F. MCKINNEY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 02-CI-00905

KENTUCKY STATE BOARD OF REGISTRATION
FOR PROFESSIONAL ENGINEERS
AND LAND SURVEYORS

APPELLEE


ORDER DENYING PETITION FOR REHEARING

* * * * *

BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

The Court having considered the appellant's petition for rehearing and the appellees's response thereto, and being sufficiently advised, it is ORDERED that the petition is hereby DENIED.

ENTERED: JUN 24 2005



JUDGE, COURT OF APPEALS

COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2005-SC-000583-D

EARL F. McKINNEY


MOVANT

v.

KENTUCKY STATE BOARD OF REGISTRATION FOR
PROFESSIONAL ENGINEERS AND LAND SURVEYORS

RESPONDENT

MOTION FOR DISCRETIONARY REVIEW



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Louisville, KY 40202
(502) 736-8100
(502) 736-8129 fax
peterlo@ploesq.com

Attorney for Movant, Earl F. McKinney

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was mailed this 25th day of July, 2005, to:

Donna Dutton
General Counsel
Board of Licensure for Professional
Engineers and Land Surveyors
160 Democrat Drive
Frankfort, KY 40601

George M. Geoghegan, III
Court of Appeals
360 Democrat Drive
Frankfort, KY 40601



Counsel for Movant

MOTION FOR DISCRETIONARY REVIEW

Comes the Movant, Earl F. McKinney, by counsel, and respectfully moves this Court, pursuant to CR 76.20 for discretionary review of the decision of the Court of Appeals of the Commonwealth of Kentucky in 2003-CA-002555-MR.

Pursuant to CR 76.20(3), the Movant states as follows:

1. The name of the Movant is Earl F. McKinney, and the name address of his counsel of record are Peter L. Ostermiller, 239 South Fifth Street, 1800 Kentucky Home Life Building, Louisville, Kentucky 40202.
- 2.. The name of the Respondent is Kentucky State Board of Registration for Professional Engineers and Land Surveyors, and the name and address of its counsel is Donna Dutton, General Counsel, 160 Democrat Drive, Frankfort, KY 40601.
3. The Opinion of the Court of Appeals of the Commonwealth of Kentucky was entered on April 22, 2005.
4. The Order of the Court of Appeals of the Commonwealth of Kentucky denying the Movant's Petition for Rehearing, the final disposition by the Court of Appeals, was entered on June 24, 2005.
5. A supersedeas bond has not been executed.
6. The following is a clear and concise statement of the material facts:

PROCEDURAL HISTORY

The case began as an administrative proceeding before the Respondent Board concerning the Professional Engineer's license of the Movant, Mr. McKinney. The Board issued a Final Order

revoking Mr. McKinney's license, alleging that Mr. McKinney had violated certain positions of the statutes and regulations concerning the licensing of Professional Engineers in Kentucky.

The administrative proceeding was essentially based on actions taken by Mr. McKinney concerning Professional Engineers licenses held by him in other States. In particular, the Board contended the Mr. McKinney had signed and sealed engineering plans using his non-Kentucky engineering stamp for non-Kentucky projects to be reviewed by permitting authorities in the particular non-Kentucky jurisdiction.

The Hearing Officer recommended that Mr. McKinney's license be suspended for a period of five years. The Board, in its Final Order, made no additional or different findings, but increased the sanction to a license revocation.

Mr. McKinney sought review before the Franklin Circuit Court, which, in a September 17, 2003 Opinion and Order, upheld the Final Order of the Respondent Board.

Thereafter, Mr. McKinney took an Appeal to the Court of Appeals. On April 22, 2005, the Court of Appeals entered an Opinion Affirming, a copy of which is attached hereto as Appendix A. Judge Knopf issued a separate concurring Opinion in which Judge Knopf expressed reservations or concerns as to sanctioning Mr. McKinney regarding the reviewing of engineering plans for out-of-State projects. Mr. McKinney filed a Petition for Rehearing. On June 24, 2005, the Court of Appeals entered an Order denying that Petition, a copy of which is attached hereto as Appendix B.

FACTS AND DISCUSSION

The underlying facts were generally undisputed. The matters at issue concerned legally inadequate speculative evidence and the improper extension of the Respondent Board's jurisdiction to extra-territorial matters outside the jurisdiction of the Respondent Board.

Mr. McKinney, prior to the action taken by the Respondent Board, had been a licensed Professional Engineer in Kentucky since 1979. Additionally, he was also a licensed Professional Engineer in most of the other States. The Board acknowledged at the administrative hearing that there was no proof that Mr. McKinney had ever practiced engineering outside of his areas of competency. Additionally, the Board acknowledged that it had no evidence that any of the engineering plans signed and sealed by Mr. McKinney were defective or posed any actual danger to public health, safety and welfare.

The Board held that Mr. McKinney had signed and sealed engineering plans without an adequate review. Mr. McKinney has a Professional Engineer licenses in most of the States, and the projects which were allegedly the subject of an inadequate review were located outside of Kentucky throughout the United States. Mr. McKinney, in his review of any particular set of plans, would confirm that the plans were in compliance with the laws of the particular jurisdiction where the project was located. Moreover, when Mr. McKinney's review was completed, the plans would be stamped and sealed with Mr. McKinney's engineering seal for the particular jurisdiction, e.g., Texas, Florida, etc.

Under recent case law from this Court, the Board may not exercise its disciplinary authority over a license holder, such as Mr. McKinney, for misconduct regarding the practice of engineering concerning engineering projects outside of Kentucky. Such an attempted exercise of authority is outside the legislative mandate of the Board and therefore outside of its jurisdiction.

In Union Underwear v. Barnhart, Ky., 50 S.W.3d 188 (2001), this Court held:

"We being our analysis with the well-established presumption against extraterritorial operation of statutes. That is, unless a contrary intent appears within the language of the statute, we presumed the statute is meant to apply only within the territorial boundaries of the Commonwealth." (emphasis added).

This Court in Barnhart, noted that this rule of statutory construction was to protect against “unintended clashes of the laws of the Commonwealth with the laws of our sister states,” citing McCullough v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963).

Moreover, the extent of an administrative body’s jurisdiction is defined by the statute creating the Board, such as KRS Chapter 322 for engineers. Curtis v. Belden Electronic Wire and Cable, Ky. App. 760 S.W.2d 97 (1988). In Curtis, the Court of Appeals held that an administrative body “cannot, by its rules and regulations, amend, alter, enlarge or limit the terms of legislative enactment.”

A review of KRS Chapter 322, regarding the authority and jurisdiction of the Board, does not contain any indication, (or “positive showing” as required under Barnhart.) that the General Assembly expressly intended that the Board’s jurisdiction would operate outside of Kentucky. Quite the contrary, KRS Chapter 322 indicates that the General Assembly intended that the territorial reach of the Board not extend beyond Kentucky’s borders. As set forth in KRS 322.010(4), the “practice of engineering” is defined as including “all professional services included in subsection (3) of this section, together with the negotiation and solicitation for engineering work on any project in this State . . .” (emphasis added).

The Board’s disciplinary authority regarding the practice of engineering could be no greater than the statutory definition of the “practice of engineering” set forth in KRS Chapter 322. For example, when KRS 322.180(2) gives the Board disciplinary authority over a license holder for “gross negligence, incompetence or misconduct in the practice of engineering,” the phrase “practice of engineering” would take the reader back to KRS 322.010(4) which defines the “practice of engineering” as limited to “engineering work of any project in this State.” (emphasis added).

Mr. McKinney’s performance of his review of engineering projects outside of Kentucky does not subject him to the jurisdiction of the Kentucky Board regarding work on those non-Kentucky

projects. In Barnhart, this Court rejected a similar argument asserted by the Plaintiff. In that case, the Plaintiff was employed by Union Underwear and worked in an Union Underwear plant in South Carolina. The corporate headquarters for Union Underwear was in Bowling Green, Kentucky, which was also the location of the persons responsible for the alleged illegal age discrimination committed against the Plaintiff working in South Carolina. This Court, in rejecting the contention that Kentucky had jurisdiction, stated that Kentucky law could not be applied to protect a person employed outside of Kentucky.

As noted in Barnhart, there are also constitutional issues which preclude the extraterritorial jurisdiction of Kentucky. As noted in Barnhart, imposing a "policy choice" established by Kentucky on the practices of other States should be done with great caution out of respect for the sovereignty of other jurisdictions, and in order to "avoid running afoul" of the Commerce Clause of the United States Constitution. Even the Board admitted during the administrative hearing that Boards from different jurisdictions have differing interpretations regarding certain core regulatory engineering concepts such as "direct supervisory control." (Hearing Transcript, Vol. 2, pp. 104-105).

The Circuit Court, in attempting to distinguish Barnhart, stated that Barnhart involved a "private party with no connection to Kentucky" alleging discrimination by a company in which the conduct occurred outside of Kentucky with the only connection to Kentucky being the employer's headquarters being located in this State. Furthermore, the Circuit Court stated that the actual conduct, i.e., the practice of engineering, occurred within Kentucky. However, the Court's reasoning was inconsistent with established legal principles, as set out in Barnhart and cases from other jurisdictions.

The Court of Appeals, in the concurring Opinion of Judge Knopf, stated that the issue of the Respondent Board's jurisdiction had been previously litigated and decided adverse to Mr. McKinney

in an unpublished decision from the Court of Appeals in June of 1994. However, this Court's decision in Barnhart, was seven years later, in 2001, and would therefore control the resolution of the present case.

Th Court of Appeals, on page four of its Opinion, stated that Barnhart is "easily distinguishable" from the present case concerning Mr. McKinney. The Court stated that the actions at issue regarding Mr. McKinney occurred in Kentucky, and that Mr. McKinney was therefore subject to discipline in Kentucky, even though the engineering projects located outside of Kentucky, involved Mr. McKinney's compliance with the laws and regulations of that other jurisdiction, concerned Mr. McKinney's signing and sealing of those plans under laws of that other jurisdiction. Additionally, Mr. McKinney was always subject to the discipline of the Licensing Board of that other jurisdiction if that other jurisdiction had any questions concerning the sufficiency of the plans prepared by Mr. McKinney. Mr. McKinney respectfully submits that the Court of Appeals' application of Barnhart was overly-restrictive.

In July of last year, the United States District Court for the Western District of Kentucky discussed the application of Barnhart. A copy of that Memorandum Opinion in Ferrer v. MedaSTAT USA, LLC, 2004 WL 2595955, is attached hereto as Appendix C. In that case, the United States District Court sustained the Defendant's Motion for Summary Judgment on the ground that the Plaintiff's sexual harassment claims under Kentucky's Civil Rights Act concerned conduct occurring outside of Kentucky. The Court cited Barnhart and stated that the issue in that case was "whether an employee employed outside of the State of Kentucky could assert a claim against an employer located in Kentucky as to decisions made in Kentucky." (Emphasis added). Likewise, in the present case, the decisions made by Mr. McKinney concerned engineering plans reviewed in Kentucky but under the law of the jurisdiction where the project was located.

Additionally, the Court in Ferrer stated that the Plaintiff alleged that she had no other forum to bring her claim. The Court rejected that contention stating that Florida, the State where the alleged discriminatory activity occurred, had a stake in preventing such conduct. Similarly, in the present case, the Licensing Board for each of the States where the projects were located actually have a greater stake in the matters at issue. The projects which were the subject of the engineering plans were located in States outside of Kentucky. Certainly, the interests of the State where the project is actually located is much greater than the interests of a foreign State, i.e., Kentucky, where the plans are reviewed, especially when the plans were not reviewed under the laws not of Kentucky, but of the jurisdiction where the project was located.

In Henriksen v. Illinois Racing Board, 688 N.E.2d 771 (Ill. App. 1997), the Illinois Board regulating the horse industry suspended a trainer following a determination that the trainer had trained the horse with a forbidden substance in the horse's bloodstream. During the period of that Illinois suspension, the trainer participated in horse races in several States outside of Illinois, including Kentucky. When the Illinois found out about this non-Illinois racing activity, the Illinois Board imposed an additional suspension. The Court in Henriksen, reversed the Illinois Board's administrative decision on the ground that the Board was attempting to extend its jurisdictional reach beyond its borders. As the Court noted, such an improper attempt at jurisdictional overreach is contrary to the seminal United States Supreme Court case of Pennoyer v. Neff, 95 U.S. 714 (1877).

Mr. McKinney respectfully submits that the Circuit Court and the Court of Appeals gave an overly-narrow reading and application of Barnhart. In summary, the Board exercised extra-territorial jurisdiction contrary to established constitutional principles. It is undisputed in this case that virtually

all of Mr. McKinney's engineering work concerns projects located outside of Kentucky in which Mr. McKinney used his stamp and seal for that particular non-Kentucky jurisdiction.

Mr. McKinney, in his Appeal to the Court of Appeals, also asserted as grounds for review the improper and speculative calculations used by the Hearing Officer to reach a determination regarding the number of plans Mr. McKinney reviewed, the presence of good faith in Mr. McKinney listing his registration as an Electrical Engineer on Applications and renewal documentation filed with jurisdictions outside of Kentucky and his statements in testimony before the Nevada Board of Professional Engineers from 1997 as to the number of engineers he had working for him. Mr. McKinney also raised up issues before the Court of Appeals his certification of a "site plan" as not constituting the unauthorized practice of land surveying. Lastly, Mr. McKinney contended that the revocation of his license was an excessive sanction.

CONCLUSION

Based on the foregoing, Mr. McKinney respectfully requests that this Court grant him Discretionary Review of the adverse decision of the Court of Appeals on the grounds set out in this Motion and the grounds raised by Mr. McKinney in his Appeal to the Court of Appeals.

Respectfully submitted,

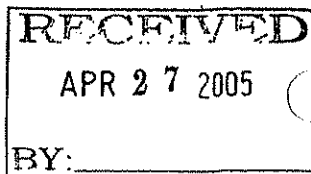


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Attorney for Movant, Earl F. McKinney

RENDERED: APRIL 22, 2005; 2:00 p.m.

NOT TO BE PUBLISHED



Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002555-MR

EARL F. MCKINNEY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 02-CI-00905

KENTUCKY STATE BOARD OF REGISTRATION
FOR PROFESSIONAL ENGINEERS
AND LAND SURVEYORS

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: DYCHE, KNOPF, AND TACKETT; JUDGES.

TACKETT, JUDGE: Earl McKinney (McKinney) appeals from a decision by the Kentucky State Board of Licensure for Professional Engineers and Land Surveyors (Board) which revoked his engineering license in the Commonwealth. McKinney claims that the Board exceeded its authority in revoking his license for his alleged negligence in reviewing engineering projects

APPENDIX A

from other states in which he is also a licensed engineer. Since the actual review work took place in Kentucky, we agree with the Board that McKinney was negligently practicing engineering in the Commonwealth and uphold the Board's decision revoking his license.

McKinney has been a licensed professional engineer in the Commonwealth since 1964. Through reciprocity, he also holds engineering licenses in forty-eight other states. At the time the Board revoked his license, most of McKinney's work consisted of reviewing prototype plans for restaurant chains, hotels and retail stores. He was the president of A & E Designers, Inc. which had its main office in Lexington, Kentucky. Nevertheless, most of the plans which he reviewed were for projects located in other states, and McKinney would sign them under the seal for the state in which the projects were to be built.

The Board brought nine allegations of negligence against McKinney and the Hearing Officer found him guilty of five. The allegations were based on his habit of signing and sealing projects with inadequate review, unauthorized sealing of a land survey plat, and making false representations on his National Council of Examiners for Engineers & Surveyors (NCEES) license renewal forms. The Board accepted the Hearing Officer's findings and revoked McKinney's license. McKinney appealed the

decision to the Franklin Circuit Court which upheld the Board's decision. This appeal followed.

On appeal, McKinney argues that the Board improperly exercised extraterritorial authority in examining his work on projects located outside the Commonwealth and sealed with engineering licenses from other states. He also claims that the Board had insufficient evidence to determine that he was guilty of the charges of negligence against him. Specifically, McKinney brings up the Board's findings that he spent insufficient time reviewing plans, that he was untruthful on his NCEES forms, that he misrepresented the number of states in which he was a licensed electrical engineer, and that his statement regarding the number of engineers he employed was untrue. Finally, McKinney contends that revocation of his license was an excessive sanction as a matter of law.

In reviewing an appeal from an administrative agency, our function is to ensure that the agency did not act arbitrarily. We must review the Board's decision to determine whether it was supported by substantial evidence and whether the Board applied the correct rule of law. Kentucky Unemployment Insurance Comm'n v. King, 657 S.W.2d 250 (Ky.App. 1983).

Substantial evidence is evidence that has "sufficient probative value to induce conviction in the minds of reasonable men."

Kentucky Racing Comm'n v. Fuller, 481 S.W.2d 298, 308 (Ky.

1972). Even if the evidence would support differing conclusions, it may be sufficient to support an agency's decision.

McKinney's first argument is that Board lacked authority to regulate his practice of engineering related to projects outside the Commonwealth. In support of this argument, he cites a decision by the Kentucky Supreme Court, Union Underwear Company, Inc. v. Barnhart, 90 S.W.3d 188 (Ky. 2001), overturning our decision which would have allowed an employee to sue Union Underwear in Kentucky where the company is headquartered. The employee had no connection to Kentucky, and the alleged conduct occurred in either Alabama or South Carolina. Barnhart is easily distinguishable from the facts at hand. In this case, the Board is regulating the conduct of an engineer licensed in the Commonwealth. Moreover, McKinney's acts in the practice of engineering actually occurred in Kentucky. Consequently, the Board did not overstep its authority to regulate McKinney's conduct in reviewing plans for out-of-state projects.

McKinney next argues that the Hearing Officer engaged in speculation to reach a determination that he spent insufficient time reviewing engineering plans. The Hearing Officer made a finding that it would have been impossible for McKinney to review all of the plans that he signed and sealed.

McKinney testified that approximately 1,000 projects came into A & E's office each year. Of those, he stated that "in the neighborhood" of 60% to 70% were plans which he would sign. McKinney now claims that the Hearing Officer's finding that he could not adequately review all the plans he signed and sealed rests on speculation. However, this discounts additional evidence introduced by Bob Wooten, a former employee of A & E. Wooten testified that he had personal knowledge that McKinney would sign and seal plans the same day that he received them and without conducting a review. Moreover, there was evidence that McKinney accidentally signed and sealed a survey plat even though he was not a professional surveyor and, thus, not authorized to do so. We are unable to say that the Board had insufficient evidence upon which to base its finding that McKinney conducted insufficient reviews of engineering plans that he signed and sealed.

The remaining evidentiary issues deal with McKinney's alleged misrepresentations regarding the status of his license, the number of states in which he was licensed as an electrical engineer, and the number of engineers he employed. McKinney filled out NCEES renewal forms indicating that his license was not suspended in any state, nor was he under investigation by any state. There was evidence that McKinney had been suspended by a number of states and that, in Texas, he had formal

disciplinary charges pending. McKinney argues that, since some of the suspensions were probated, he could not have known that he needed to include that information on his NCEES forms.

Moreover, the Texas disciplinary charges were filed at the conclusion of that state's investigation, so McKinney argues he was technically no longer under investigation. Despite these contentions, McKinney fails to persuade us that the Board had insufficient evidence to support its finding that he was untruthful in filling out his NCEES forms.

McKinney also claims that the Board erred in finding that he misrepresented the number of states in which he was an electrical engineer and the number of engineers he employed. He contends that statements regarding the number of states in which he was licensed as an electrical engineer were made in good faith. McKinney inflated the number of states in which he had such a licensed specialty in testimony to the Nevada Board of Professional Engineers and Land Surveyors and in his application to be licensed as an electrical engineer in California.

Moreover, in his Nevada testimony, McKinney stated that he employed three engineers each in structural, electrical, and mechanical engineering. In truth, McKinney employed a total of three engineers, including himself. He now argues that his statements as to the number of engineers he employed was a matter of opinion rather than an untruthful statement. We

disagree. There was substantial evidence to support the Board's findings that McKinney made untruthful representations regarding his licensure as an electrical engineer and the number of engineers he employed.

Finally, McKinney argues that the penalty determined by the Board was excessive as a matter of law. He points out that there was no evidence that any of the plans he signed and sealed contained defects which might have posed a risk to the public health or safety. Kentucky Revised Statute 322.180 provides a wide range of penalties which the Board can impose on licensed engineers. We do not have the authority to change the penalty assessed by the Board unless it was arbitrary or capricious or constituted a clear abuse of discretion. City of Louisville v. Milligan, 798 S.W.2d 454 (Ky. 1990). The Board had the authority to revoke McKinney's license due to the numerous misrepresentations regarding his license and his practice of signing and sealing plans without an adequate review. The fact that McKinney's procedures for reviewing plans allowed him to inadvertently sign and seal a land survey plat is but one example of the lack of review he engaged in. The Board was not obligated to wade through the numerous plans certified by McKinney in an effort to point out hazards in the designs.

For the foregoing reason, the decision of the Kentucky State Board of Licensure for Professional Engineers and Land

Surveyors revoking McKinney's Kentucky license as an engineer is affirmed.

DYCHE, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS WITH SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING: I concur in most of the reasoning and the result reached by the majority. However, with respect to the Board's sanctioning of McKinney for misconduct in reviewing engineering plans for out-of-state projects, I do so based primarily on the history of this case and these parties. In 1992, the Board brought an administrative action against McKinney alleging most of the same type of misconduct as it asserted in this action. McKinney argued then, as he argues now, that the Board lacked jurisdiction and statutory authority to initiate any discipline proceeding against him based upon conduct involving engineering projects outside of Kentucky.

In an unpublished opinion, this Court disagreed.¹ The prior panel of this Court noted that KRS 322.180 authorizes the Board to regulate the practice of engineering within Kentucky. After considering the definitions of "engineering" and "the practice of engineering" contained in KRS 322.010(3) & (4), this Court concluded that the Board is authorized to regulate all engineering work that takes place within Kentucky, even if it

¹ Earl F. McKinney v. Kentucky State Board of Registration for Professional Engineers and Land Surveyors, No. 93-CA-001561-MR (Not-to-be-Published Opinion rendered June 24, 1994).

involves projects outside of Kentucky and is under the authority of another state's professional license.

Were we considering this matter on a clean slate, I might reach a different conclusion. Nevertheless, the issue of the Board's jurisdiction was fully litigated in the prior action. Therefore, McKinney is precluded from re-litigating that matter.² Furthermore, as the majority correctly points out, Union Underwear Co. Inc. v. Barnhart,³ does not alter this result. In Union Underwear, the Kentucky Supreme Court held that the Kentucky Civil Rights Act cannot have extraterritorial application to conduct which occurred entirely outside of Kentucky. In this case, McKinney's acts in the practice of engineering actually occurred in Kentucky. As a practical matter I believe the Board should defer disciplinary action to the licensing bodies in the appropriate jurisdictions, but I agree with the majority that the Board had subject matter jurisdiction in this case.

BRIEF FOR APPELLANT:

Peter L. Ostermiller
Robert L. Abell
Louisville, Kentucky

BRIEF FOR APPELLEE:

B. R. Salyer
Frankfort, Kentucky

² See Sedley v. City of West Buechel, 461 S.W.2d 556 (Ky. 1970).

³ 50 S.W.3d 188 (Ky. 2001).

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-002555-MR

EARL F. MCKINNEY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 02-CI-00905

KENTUCKY STATE BOARD OF REGISTRATION
FOR PROFESSIONAL ENGINEERS
AND LAND SURVEYORS

APPELLEE


ORDER DENYING PETITION FOR REHEARING

* * * * *

BEFORE: DYCHE, KNOFF, AND TACKETT, JUDGES.

The Court having considered the appellant's petition for rehearing and the appellees's response thereto, and being sufficiently advised, it is ORDERED that the petition is hereby DENIED.

ENTERED: JUN 24 2005



JUDGE, COURT OF APPEALS

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
W.D. Kentucky.
Deborah FERRER, Plaintiff

v.

MedaSTAT USA LLC, et al., Defendants.
Civil Action No. 3:03CV-277-H.

July 8, 2004.

Bryan Todd Thompson, Clay M. Stevens, Thompson Miller
& Simpson PLC, Louisville, KY, for Plaintiff.

John H. Dwyer, Jr., Pedley Zielke Gordinier & Pence,
PLLC, Robert E. Champagne, III, Louisville, KY, for
Defendant.

MEMORANDUM OPINION

JOHN G. HEYBURN II, Chief Court Judge.

*1 Plaintiff, Deborah Ferrer ("Plaintiff") claims that Defendants, MedaSTAT USA LLC ("MedaSTAT"), Kevin M. McKim (MedaSTAT's president), and Paul Elmes (MedaSTAT's chief executive officer), violated the Kentucky Civil Rights Act, KRS Chapter 344 ("KCRA" or "the Act"). Plaintiff alleges that Defendants: (1) discriminated against her on the basis of her sex, thereby creating a hostile work environment; (2) committed sexual harassment *quid pro quo*, by discharging her when she refused the sexual demands of a supervisor; and (3) committed retaliation in terminating her when she exercised her rights under the KCRA. Plaintiff also claims the tort of outrage against Defendants McKim and Elmes in their individual capacity. Defendants have moved for summary judgment on all claims.

I.

MedaSTAT was formed in Kentucky and has its principle place of business in Louisville, Kentucky. It supplies specialty beds, oxygen therapy equipment, and other types of therapy equipment to nursing home residents in numerous states. In February 2001, MedaSTAT interviewed Plaintiff for the Florida Regional Sales Manager position in

Louisville, Kentucky. She was hired the same day. Plaintiff received a company car in Louisville prior to the start of her employment. Plaintiff received two and a half days of orientation in Louisville. Plaintiff came to Kentucky only on these three occasions in the course of her employment with MedaSTAT. Plaintiff was responsible for MedaSTAT's business in Florida and Alabama.

Plaintiff alleges that the sexually oriented, offensive, inappropriate, and predatory comments started almost immediately. Plaintiff says that McKim made statements such as "I knew Paul [Elmes] would hire you ... I ran back to Paul's office and said 'Debbie is here' and 'you are going to like it,' " and Elmes saying "I knew I wanted you right away," were sexual in nature. While co-traveling with Plaintiff, Elmes said he did not want her married or involved. While co-traveling with McKim, Plaintiff mentioned her girlfriend, and McKim responded by saying "when we get to know each other better, we'll go to New York City, I'll meet your girlfriend. We'll have lots of fun." McKim verbalized to Plaintiff that he "thought of everything in sexual terms." Such statements were always sandwiched with comments about how much money she would make and how far she would go in the company. McKim and Elmes constantly talked about women, women's behavior, and women's anatomy. McKim and Elmes even began talking about Plaintiff's daughter in a suggestive way. All of these statements by McKim and Elmes caused Plaintiff to be scared, upset, nervous, and appalled. None of these events occurred in Kentucky.

The majority of Plaintiff's allegations, as to her hostile environment, *quid pro quo* sexual harassment, and retaliation claims, stem from one occurrence with a MedaSTAT co-worker Brian Woolsey. On May 15, 2001, Woolsey traveled from Louisville to Florida to teach Plaintiff about MedaSTAT's methods of operation. Woolsey made several sales calls with Plaintiff. Later that night at dinner, Woolsey began by propositioning Plaintiff to use drugs and have sex with him. Woolsey told Plaintiff how attractive she was, that anyone would want to have sex with her including Elmes, and that if "you scratch my back, I'll scratch yours." Woolsey discussed his open relationship with his wife, that his wife was bi-sexual and would "like"

Plaintiff, and finally, that he wanted to do illegal drugs and have sex with Plaintiff. Plaintiff declined and left the restaurant. Woolsey followed Plaintiff to her car, grabbed her arm, and told her that she would be missing a "good time." Plaintiff was afraid, dumbfounded, repulsed, and indignant at Woolsey's disrespectful behavior.

*2 When Plaintiff arrived home Woolsey called her two times and again asked her to join him. Plaintiff responded that she did not want to, to which Woolsey said that he "might as well drive back to Louisville now." Plaintiff states she was not valued for her business skills but what she could offer sexually. Plaintiff decided to contact Elmes and McKim immediately, even though it was around ten o'clock at night. Both were at the Louisville office when Plaintiff called. Plaintiff talked to McKim who said that he would investigate the situation. Elmes also got on the phone, and Plaintiff states that he was angry at her for what had occurred with Woolsey. McKim told Plaintiff to write a report of the incident and send it to him in the morning.

Within forty-eight hours of sending her complaint, Plaintiff received a letter from McKim suspending her employment with MedaSTAT. Plaintiff had undergone ruptured disk surgery during her short employment with MedaSTAT. MedaSTAT's suspension letter was in response to the doctor's release submitted by Plaintiff on May 10, 2001, which said that she could not sit for longer than thirty minutes and therefore could not fulfill the driving requirements of her job. MedaSTAT's letter stated that Plaintiff's condition precluded her from fulfilling the duties listed in her job description, and the basis of the suspension was the risk she posed to herself and others while driving the company car. The letter went on to say that upon MedaSTAT receiving a doctor's release allowing Plaintiff to perform her duties, her status would be reviewed.

On May 24, 2001, MedaSTAT sent Plaintiff a letter terminating her position as Regional Manager. Based on the evaluation, MedaSTAT found that Plaintiff failed to place even one specialty bed in a nursing home--the primary focus of her job. MedaSTAT also asserts that Plaintiff failed to develop a positive working relationship with subordinates. Plaintiff feels she was fired because she reported Woolsey's sexual harassment. MedaSTAT terminated Plaintiff several

days before the conclusion of her probation period. McKim and Elmes picked up the company car from Plaintiff in Florida. Plaintiff was employed by MedaSTAT for eighty-seven days before being terminated.

II.

Plaintiff alleges Defendants violated the KCRA by creating a hostile work environment, committing sexual harassment *quid pro quo*, and retaliating against Plaintiff for reporting the sexual harassment to superiors. Plaintiff only alleges KCRA violations in her complaint, and this Court's jurisdiction is based solely on diversity jurisdiction--no federal claims or questions are asserted. Defendants move for summary judgment on all of the KCRA claims because the conduct Plaintiff claims amounted to sexual harassment occurred outside the state of Kentucky. Defendants argue that the Kentucky Supreme Court has expressly prohibited such extraterritorial application of the KCRA in *Union Underwear Comp., Inc. v. Barnhart*, 50 S.W.3d 188 (Ky.2001). This Court agrees.

*3 In *Union Underwear*, the plaintiff brought a claim against his employer, Fruit of the Loom, alleging he had been illegally discharged because of his age in violation of the KCRA. 50 S.W.3d at 189. *Union Underwear* concerned whether an employee employed outside the state of Kentucky could assert a claim against an employer located in Kentucky as to decisions made in Kentucky. The defendant employer maintained its headquarters in Bowling Green, Kentucky; this was the plaintiff's only connection to Kentucky. *Id.* During all of plaintiff's employment he lived and worked outside of Kentucky--in both South Carolina and Alabama. *Id.* at 190. He was employed in South Carolina when dismissed from his job. *Id.* Any discrimination occurred in either South Carolina or Alabama. *Id.* The court held that the KCRA does not have extraterritorial application, and that based upon the facts of plaintiff's case, allowing him to obtain relief under the KCRA would be an extraterritorial application of the Act. *Id.* at 193.

Plaintiff has never lived or worked in Kentucky. Plaintiff only came to Kentucky three times to visit MedaSTAT's headquarters. None of the discriminatory actions stem from these three visits. None of the discriminatory actions

Plaintiff claims make up the hostile work environment, sexual harassment *quid pro quo*, or retaliation claims occurred in Kentucky. The alleged hostile work environment actions by either Elmes and/or McKim all occurred outside of Kentucky while co-traveling on business trips with Plaintiff, or they occurred via telephone conversation with McKim and Elmes in Kentucky and Plaintiff in Florida. All of the actions by Woolsey were outside of Kentucky in Florida. In light of the *Union Underwear* holding, allowing Plaintiff's asserted claims would be an extraterritorial application of the KCRA. Even though Defendant's decisions as to Plaintiff's employment were made in Kentucky, it is the fact that Plaintiff was located outside the state of Kentucky that controls the application of the KCRA. *Id.* at 193 n. 1.

Plaintiff attempts to distinguish her own circumstances from those of the plaintiff in *Union Underwear*. Plaintiff asserts that she had many more contacts to Kentucky than the *Union Underwear* plaintiff because she was inextricably intertwined with her Kentucky employer. Her immediate supervisors, Elmes and McKim, lived in Kentucky. Plaintiff called in or faxed the Louisville office virtually every day. MedaSTAT issued her a Louisville cell phone with a Louisville area code, her secretaries were in Louisville, and Plaintiff's paychecks and expense checks were signed and issued from the Louisville office. These facts do not seem relevant to the *Union Underwear* analysis.

The *Union Underwear* analysis centered around where the plaintiff worked, lived, and where the discrimination occurred, not on the plaintiff's minimum contacts with Kentucky, due process, or subject-matter jurisdiction. *Id.* at 190. [FN1] The court was very cognizant of the fact that the extraterritorial application of the KCRA would hinder, rather than help, the elimination of discrimination on a national basis. *Id.* at 192. The court said that although Congress encouraged states to enact their own versions of anti-discrimination acts, such legislation could only be viewed as providing protection from discrimination *in addition to* the federal statutory protections. *Id.* (emphasis added). Rather than imposing a Kentucky policy choice on the employment practices of another state, the court exercised prudence, caution, and respect for its sister states

and refrained from extraterritorial application of the KCRA. *Id.* at 193.

FN1. The court in *Union Underwear* discussed that subject matter jurisdiction refers to the court's power to hear this kind of case rather than the court's power to hear a particular case. 50 S.W.3d at 189 (citing *Duncan v. O'Nan*, 451 S.W.2d 626, 631 (Ky.1970)). The court found that the trial court was clearly empowered to hear this kind of employment discrimination case brought under the KCRA and therefore had jurisdiction. *Id.* at 190. The court instead found that the KCRA did not apply to the plaintiff because it would be an extraterritorial application of the Act, not because of lack of jurisdiction, and therefore his claim should have been summarily dismissed. *Id.*

*4 Plaintiff, just as the plaintiff in *Union Underwear*, asserts that if she cannot file her discrimination claims in this Court, there are no other forums for her to bring her grievances. *Id.* at 192. This is simply not the case. Florida, the state where the alleged discriminatory and tortious actions occurred, has a stake in preventing sexually discriminatory conduct by an employer to an employee located in its state. Florida has a statutory equivalent to the KCRA, the Florida Civil Rights Act, and Plaintiff could bring her sexual discrimination claims under it if MedaSTAT has the minimum contacts with Florida.

It is important to note that Plaintiff failed to assert any federal claims in her complaint-many of which are exactly the same causes of action as under the KCRA. Plaintiff could have amended her complaint to include the federal claims in her complaint. Whether this was a litigation tactic or a simple oversight by Plaintiff's council is unknown. However, what is relevant here is that none of these things were done. Just as in *Union Underwear*, Plaintiff has or had forums to seek relief other than in Kentucky courts asserting Kentucky state law. Therefore, this holding does not let MedaSTAT "off the hook" and give it "free reign to discriminate "against its out of state workers. *Id.* at 192.

III.

Defendants McKim and Elmes also move for summary

judgment on Plaintiff's outrage claims against them in their individual capacities. The elements of the tort of outrage, or intentional infliction of emotional distress ("IIED") are: (1) the wrongdoer's conduct must be intentional or reckless; (2) conduct must be outrageous and intolerable in that it offends against generally acceptable standards of decency and morality; (3) there must be a causal connection between wrongdoer's conduct and emotional distress; and (4) emotional distress must be severe. See *Gilbert v. Barks*, 987 S.W.2d 772, 777 (Ky.1999); see also *Brewer v. Hillard*, 15 S.W.3d 1, 6 (Ky.App.1999). Defendants McKim and Elmes assert that their alleged behavior, even taken in light most favorable to Plaintiff, does not rise to the egregious level that is necessary for an IIED claim.

The Kentucky Supreme Court first recognized the tort of outrage in *Craft v. Rice*, 671 S.W.2d 247 (Ky.1984). The court adopted the traditional form of the tort found in the Restatement (Second) of Torts § 46 (1965): "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." *Id.* at 251. Comment (d) to the Restatement outlines the type of conduct which is contemplated under the rule:

It has not been enough that the defendant has acted with an intent which is tortious ..., or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice" Liability has been found where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities.

*5 Kentucky courts have expressly adopted a "restrictive" view of the tort of outrage. *Kroger Co. v. Willgruber*, 920 S.W.2d 61, 65 (Ky.1996); *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky.1990); *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 805-06 (6th Cir.1994). The

conduct must be extreme and outrageous to the average citizen; the plaintiff's mere "belief" that the conduct is outrageous is insufficient. *Bevins v. Dollar General Corp.*, 952 F.Supp. 504, 510 (E.D.Ky.1997) (citing *Seitz*, 796 S.W.2d at 4). The evaluation of the criteria, should be "stringent," and the action must be "utterly intolerable in a civilized community," a type of "harassment intended to cause extreme emotional distress." *Stewart v. Pantry, Inc.*, 715 F.Supp. 1361 (W.D.Ky.1988). [FN2] In *Smith v. Franklin County*, 227 F.Supp.2d 667, 684-685 (E.D.Ky.2002), the court noted that Kentucky cases have focused on the duration of the treatment and the relationship of the parties in determining what constitutes outrageous conduct. [FN3]

FN2. An action for outrage will not lie for "petty insults, unkind words and minor indignities"; the action only lies for conduct which is truly "outrageous and intolerable." *Willgruber*, 920 S.W.2d at 65. Additionally, a special relationship between the parties may make otherwise tenable conduct outrageous. *Osborne v. Payne*, 31 S.W.3d 911 (Ky.2000) (holding that plaintiff had special relationship with priest as marriage counselor and that whether special relationship was violated in outrageous fashion where priest had affair with plaintiff's former wife precluded summary judgment for priest).

FN3. See *Craft*, 671 S.W.2d at 247 (maintaining surveillance of plaintiff, telling her on the CB radio that her husband would be put in jail, and driving so as to force her into an opposing lane of traffic rose to the level of conduct necessary for claim of outrageous and intolerable conduct against a police officer); *Seitz*, 796 S.W.2d at 1 (curt and insensitive comments for patient to "shut up" and that the hospital would dispose of her dead baby were not extreme, outrageous, or intentionally/recklessly the cause of severe emotional distress even where nurses had ignored the plaintiff's cries for help through her distress and plaintiff had delivered the baby into a bedpan, dead on arrival); *Wilson v. Lowe's Home Center*, 75

S.W.3d 229 (Ky.App.2001) (holding that reasonable minds could differ as to whether racial remarks made on a daily basis by coworkers and supervisors for period of seven years constituted outrageous conduct and that determination was subject to determination by jury); *Burgess v. Taylor*, 44 S.W.3d 806 (Ky.App. 2001) (lower court properly submitted claim of outrage to jury where defendants had sold plaintiffs beloved horses to slaughterhouse and evidence showed that defendants were aware of her attachment to the animals and that plaintiff had suffered severe emotional distress); *Brewer*, 15 S.W.3d at 1 (constant lewd name calling and multiple unsolicited and unwanted requests for homosexual sex could rise to the level of outrageous conduct and was appropriate for determination by jury).

It is not clear whether Plaintiff asserts her outrage/IIED claims against MedaSTAT or McKim and Elmes in their individual capacities. [FN4] If Plaintiff is in fact asserting an IIED claim against the employer MedaSTAT, such a claim is preempted by the KCRA. *Kroger Co. v. Buckley*, 113 S.W.3d 644 (Ky.App.2003), and *Wilson*, 75 S.W.3d at 229, both hold that when a plaintiff prosecutes a statutory discrimination claim under the KCRA and a common law claim of IIED/outrageous conduct, the former preempts the latter. [FN5] If, however, her claims are against Elmes and McKim, even when presented in the most favorable light, these do not rise to the level anticipated by the Restatement and Kentucky's courts.

FN4. In Plaintiff's response she states that it is clear that "MedaSTAT's conduct--of asking Ferrer for a written complaint of sexual harassment allegations then plainly retaliating against Ferrer on the very same day by suspending and then terminating her employment--is severe. It is more than 'petty insults, unkind words and minor indignities' that do not state a claim for outrage ...". Plaintiff does not allege in her response any actions by McKim or Elmes to support her individual outrage claims against them.

FN5. The reasoning for this preemption is that the

KCRA extends protection to personal dignity and freedom from humiliation of individuals, and this is interpreted as allowing a claim of damages for humiliation and personal indignity. See *McNeal v. Armour and Co.*, 660 S.W.2d 857, 958 (Ky.App.1983). Likewise, an outrage claim seeks damages for extreme emotional distress. *Buckley*, 113 S.W.3d at 646. Because of the preemption articulated in *Grzyb v. Evans*, 700 S.W.2d 399, 401 (Ky.1985), all outrage claims are subsumed by the KCRA and the remedies available in that statute. This Court discussed *Grzyb* preemption in the context of the KCRA and an outrage claim in *Wiseman v. Wayne Supply Co.*, 2004 WL 62498, *7 (W.D.Ky.2004). The Court held that when a statute or legislative enactment declares an act unlawful and specifies the civil remedy available to the aggrieved party, the aggrieved party is bound by the statutory remedy. See *Grzyb*, 700 S.W.2d at 401; see also *Harvey v. I.T.W., Inc.*, 672 F.Supp 973, 976 (W.D.Ky.1987). If the statute also provides structure for pursuing the claim, the aggrieved party is limited to that structure. *Harvey*, 672 F.Supp. at 976. In other words, the same statute that could provide the underpinnings of an outrage claim cannot do so if it also structures the remedy. *Wiseman*, 2004 WL 62498 at *7. This *Grzyb* preemption has identical application to the current set of facts, where Plaintiff has asserted claims under the KCRA, which structures the remedy for Plaintiff, and an outrage claim.

Plaintiff says that Elmes and McKim subjected her to sexually suggestive comments throughout the course of her eighty-seven day employment, including comments about the clothes Plaintiff wore and how her clothes showed her breasts and legs. Plaintiff asserts that Elmes made sexual comments, such as "I knew I liked you," "I knew I wanted you right away," and "You are a very attractive woman ... any man in your life? Do you want one?" McKim made sexual comments about meeting Plaintiff's girlfriend and "having a good time," as well as telling Plaintiff not to get married or involved because "I've got plans for you." As stated before, McKim and Elmes talked constantly about

sex, paying for sex, women's behavior, and women's anatomy. McKim told Plaintiff that his type was petite blondes with glasses, which Plaintiff asserts was directed at her. Defendants also suggested that Plaintiff have plastic surgery such as breast augmentation. Elmes talked about a co-worker's wife, said she was fat, and had a fat "ass."

These comments certainly could be labeled offensive, inappropriate, crude, and not to be tolerated in the workplace. However, such conduct would not seem to rise to the level of "atrocious," "extreme," "outrageous," or "beyond all possible bounds of decency," that an outrage claim requires. See *Wathen v. General Electric Corp.*, 115 F.3d 400, 402 (6th Cir.1997). [FN6] The Court finds that the facts here are not nearly so egregious as those in *Brewer* or *Akers v. Alvey*, 338 F.3d 491 (6th Cir.2003). Plaintiff's allegations are more like those of *Wathen* than *Brewer* because the comments by Elmes and McKim were sexual jokes, comments, and innuendos, but they were not the blatant physically touching or requests for sex that occurred in *Brewer*. [FN7]

FN6. In *Wathen* the Sixth Circuit held that sexual innuendo and comments by supervisors were not atrocious and utterly intolerable to be considered HED under Kentucky law. 115 F.3d at 402.

FN7. The Sixth Circuit recognized its holding in *Wathen*, but the court felt that the explicit sexual name calling, request for sex and physical touching went far past "sexual jokes, comments and innuendos." *Brewer*, 15 S.W.3d at 7.

*6 The Court concludes that the allegations here constitute "petty insults, unkind words and minor indignities" one would not anticipate encountering in a work environment, but they do not rise to the level of outrageous conduct. Also, neither the duration nor the frequency of the alleged behavior extend to that point that the case law would recognize as creating otherwise relatively isolated incidents actionable. See *Smith*, 227 F.Supp.2d at 685.

The Court will enter an Order consistent with this Memorandum.

ORDER

Defendants have moved for summary judgment on all of Plaintiff's claims. For the reasons set out in its Memorandum Opinion and being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendants' motion for summary judgment is SUSTAINED and Plaintiff's complaint is DISMISSED WITH PREJUDICE.

This is a final order.

2004 WL 2595955 (W.D.Ky.)

Motions, Pleadings and Filings (Back to top)

• 3:03cv00277 (Docket) (May. 06, 2003)

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COMMONWEALTH OF KENTUCKY
SUPREME COURT
2005-SC-000583-D

EARL F. McKINNEY

MOVANT

VS:

RESPONSE TO MOVANT'S MOTION
FOR DISCRETIONARY REVIEW

KENTUCKY STATE BOARD OF REGISTRATION
FOR PROFESSIONAL ENGINEERS AND LAND
SURVEYORS

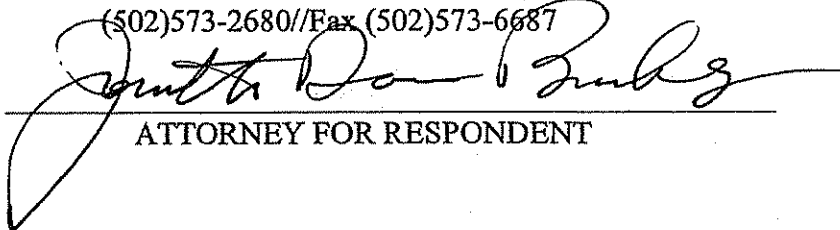
RESPONDENT

ON MOTION FOR DISCRETIONARY REVIEW
OF A COURT OF APPEALS DECISION
2003-CA-002555-MR

FRANKLIN CIRCUIT COURT
02-CI-00905

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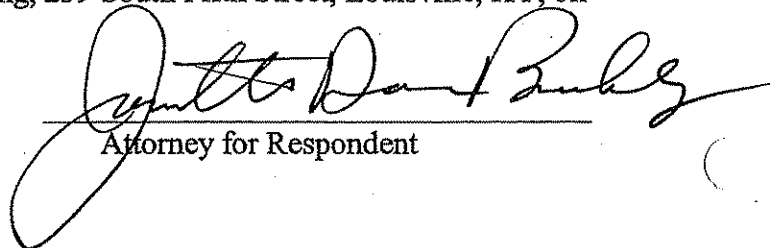
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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Response has been hand delivered to Susan Stokley Clary, Clerk, Supreme Court of Kentucky, Room 209, State Capitol, 700 Capital Ave., Frankfort, KY 40601-3488 (10 Originals); and to George M. Geoghegan, III, Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601; and mailed to the Hon. Peter L. Ostermiller, 1800 Kentucky Home Life Building, 239 South Fifth Street, Louisville, KY, on this the 30th day of August 2005.



Attorney for Respondent

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Earl McKinney (McKinney) is a professional engineer, licensed in Kentucky as well as 48 other states, the District of Columbia and Puerto Rico. Many, if not all, of those licenses were obtained by reciprocity. McKinney works from an office located in Lexington, KY.

The Kentucky State Board of Licensure for Professional Engineers and Land Surveyors (Board) brought an action pursuant to KRS 322.180, against McKinney alleging nine instances of violations in his practice as a professional engineer.

The Hearing Officer, after a three day trial, issued a very detailed 78 page decision finding McKinney guilty of five of the charges.

The Board accepted the Hearing Officer's findings and revoked McKinney's license.

McKinney sought review before the Franklin Circuit Court, which upheld the Final Order of the Board in its Opinion dated September 17, 2003.

McKinney appealed to the Court of Appeals which issued a unanimous opinion dated April 22, 2005, affirming the opinion of the Franklin Circuit Court.

McKinney's Motion for Discretionary Review to this Court, followed.

II. FACTS AND DISCUSSION

The version of **KRS 322.180** in effect at the relevant times hereto, provided in part, that:

The board shall have the power to suspend, refuse to renew, or revoke the registration of any registrant, reprimand, place on probation, or fine not to exceed one thousand dollars (\$1,000), any registrant who is found guilty by the board of:

...(2) Any ...misconduct in the practice of engineering or surveying..;

...(4) Violation of the code of professional practice and conduct which has been adopted by the board.

The Code of Professional Practice & Conduct, referenced in KRS 322.180(4), provided in part, as follows:

201 KAR 18.140. Code of professional practice and conduct.

Section 1. The engineer or land surveyor shall conduct his practice in order to protect the public health, safety, and welfare.

Section 2. The engineer or land surveyor shall issue public statements only in an objective and truthful manner.

... Section 6. The engineer or land surveyor shall perform his services only in areas of his competence.

Section 7. The engineer or land surveyor shall not affix his signature and/or seal to any engineering or land surveying plan, plat, or document dealing with subject matter in which he lacks competence by virtue of education or experience, nor to any such plan, plat, or document not prepared by him or under his direct supervisory control.

... Section 9. The professional engineer or land surveyor shall avoid conduct likely to discredit or reflect unfavorably upon the dignity or honor of the profession.

The terms "engineering" and the "practice of engineering" were defined, at that time, in KRS 322.010(3) and (4) as follows:

(3) "Engineering" includes any service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning, and design of engineering works and systems, planning the use of land and waters, and the review of construction for the purpose of assuring compliance with drawings and specifications; any of which embraces such service or work either public or private, in connection with any utilities, structures, certain buildings, building systems, machines, equipment, processes, work systems or projects with which the public welfare or the safeguarding of life, health or property is concerned, when such professional

service requires the application of engineering principles and data. It does not include the work ordinarily performed by persons who operate or maintain machinery or equipment, such as locomotive, stationary, marine, or power plant operators, nor work embraced within the practice of land surveying;

(4) "Practice of engineering" includes all professional services included in subsection (3) of this section, together with the negotiation or solicitation for engineering work on any project in this state, regardless of whether the persons engaged in this practice are residents of this state or have their principal office or place of business in this state or any other state or country, and regardless of whether they are performing one (1) or all of these duties, or whether they are performing them in person or as the directing heads of offices or organizations.

In the Hearing Officer's **Findings of Fact and Conclusions of Law**, the Hearing Officer found McKinney guilty of the following::

Charge 1(a) and 1(b): Making untruthful statements on his National Council of Examiners for Engineers & Surveyors (NCEES) annual renewals for nine separate years (Finding No. 34 and Finding No. 49); and

Charge 2(a): Testifying untruthfully before the Nevada Board of Professional Engineers and Land Surveyors in a disciplinary proceeding (Finding No. 90); and

Charge 2(b): Making untruthful statements in applying for a license as an electrical engineer in California (Finding No. 90); and

Charge 4: A second instance of testifying untruthfully before the Nevada Board of Professional Engineers and Land Surveyors in a disciplinary proceeding (Finding No. 106); and

Charge 5: Signing and sealing engineering plans without having reviewed the plans first, during the period between 1993 and 1996 (Finding No. 157); and

Charge 9: Signing and sealing a plat of a survey of property in Hopkinsville, KY, despite having no license as a surveyor (Findings No. 198 and 199).

In the Hearing Officer's **Conclusions of Law**, the Hearing Officer concluded that:

Charge 5 constituted a violation of **Section 1** of the Code of Professional Practice and Conduct (KRS 322.180(4) and 201 KAR 18:140), **Duty to Protect the Public Health, Safety, and Welfare**; and

Charges 1(a), 1(b), 2(a), 2(b), and 4 constituted violations of **Section 2** of the Code of Professional Practice and Conduct (KRS 322.180(4) and 201 KAR 18:140), **Duty to Issue Public Statements in an Objective and Truthful Manner**; and

Charge 9 constituted a violation of **Section 6** of the Code of Professional Practice and Conduct (KRS 322.180(4) and 201 KAR 18:140), **Duty to Perform Services Only in Areas of Competence**; and

Charges 1(a), 1(b), 5, and 9 constituted violation of **Section 9** of the Code of Professional Practice and Conduct (KRS 322.180(4) and 201 KAR 18:140), **Duty to Avoid Conduct Likely to Discredit or Reflect Unfavorably Upon the Dignity or Honor of the Profession**; and

Charges 5 and 9 constituted a violation of KRS 322.180 (2), **Misconduct in the Practice of Engineering**.

(Finding No. 31)

McKinney's Motion for Discretionary Review essentially concentrates only on Charge 5, that he signed and sealed engineering plans without having reviewed them first, as a violation of KRS 322.180(2), Misconduct in the Practice of Engineering.

McKinney's contention is that since most of these plans involved in Charge 5 were for projects located in other states, he has not practiced engineering in Kentucky and therefore the Board has no right to discipline him. As authority, he relies primarily on the Kentucky Supreme Court case of Union Underwear Company, Inc. v. Barnhart, 90 S.W. 3rd 188 (Ky. 2001), a case which denied an employee the right to sue in Kentucky, the defendant employer company headquartered in Kentucky, when the employee had no connection with Kentucky, and the conduct occurred in either Alabama or South Carolina.

As the Hearing Officer, the Franklin Circuit Court, and the Kentucky Court of Appeals all found, Barnhart is easily distinguishable from the facts at hand; here, McKinney's acts which are the basis for the charges for which he was found guilty, all occurred within the boundaries of Kentucky, with the exception of McKinney's untruthful testimony in front of the Nevada Board.

The NCEES annual renewals on which McKinney was untruthful (Charges 1(a) and 1(b)), were all executed in Kentucky (Findings No. 28, 31, 36, 39, 42, and 45).

The application for the California Professional Engineer's License on which McKinney was untruthful (Charge 2(b)), was executed in Kentucky (Finding No. 79).

The signing and sealing of all the plans of Charge 5, occurred in Kentucky, and approximately 6 - 14 projects of the projects involved in that plan stamping operation, were Kentucky projects (Finding No. 133).

The plat of survey that McKinney unlawfully stamped and sealed, was of property in Hopkinsville, KY.

McKinney, unlike the Appellant in Barnhart clearly has an extensive presence in Kentucky with regard to the proscribed behavior, and the application of Barnhart is inappropriate here.

Even if the facts of our case did not involve acts in the practice of engineering actually occurring within the borders of our state, Barnhart would still be of little application. To support McKinney's position, one would have to take a creative interpretation of the plain language of KRS 322.010(4).

McKinney would have the Court ignore the unambiguous language of that statute which reads:

(4) "Practice of engineering" includes all professional services included in subsection (3) of this section, together with the negotiation or solicitation for engineering work on any project in this state, regardless of whether the persons engaged in this practice are residents of this state or have their principal office or place of business in this state or any other state or country, and regardless of whether they are performing one (1) or all of these duties, or whether they are performing them in person or as the directing heads of offices or organizations. (emphasis added.)

The "Practice of engineering" includes all services which are identified in sub-section 3 of KRS 322.010. In addition, the "Practice of Engineering" includes negotiation or solicitation for engineering work, but only if the negotiation or solicitation for engineering work is for a project in this state. The limitation of the phrase "for a project in this state" goes only to the instance of one soliciting or negotiating for engineering work; the first part of the statute is not modified by that limitation.

Thus, the statute provides, in essence, as follows: if one performs the service of consulting, investigating, evaluating, planning and designing engineering works and systems while he is physically present in this state, he would be practicing engineering regardless of where the project is located. However, if the engineer was present in this state only for the purpose of soliciting or negotiating for an engineering job to be performed in another state, he would not be considered to be practicing engineering in Kentucky. For example, an Indiana engineering company who advertised in the *Louisville Courier Journal* newspaper for work in the state of Indiana, would not be subject to Kentucky's regulatory Board for that action..

Additionally, as Movant also noted, the rule of statutory construction as applied in Barnhart was "to protect against "unintended clashes of the laws of the Commonwealth with the laws of our sister states" ". Here, the Board seeks only to deal with McKinney's Kentucky

license for the proscribed behavior , and it is up to any other state, should they so decide, to bring their own actions on their own licensing concerns. No other state has jurisdiction over McKinney's Kentucky license just as Kentucky has no jurisdiction over any other state's licensing authority. There is no way our decision will conflict with the laws of any other jurisdiction. The justification for the approach to statutory construction delineated Barnhart is missing from our set of facts.

In our facts, McKinney stamped and sealed plans for projects both in and out of Kentucky, without reviewing them and is therefore, under any interpretation of the statute, the proper subject for discipline by the Board on that charge alone, in addition to the other charges substantiated in the hearing.

The Ferrer v. MedaSTAT USA, LLC, 2004 WL 2595955 case attached as Appendix C to Movant's motion, is similarly distinguishable in that all of the conduct complained of in that matter occurred outside of Kentucky, unlike the facts of our case.

Additionally, the Henriksen v. Illinois Racing Board, 688 N.E. 771 (Ill. App.1997) case cited by Movant is also inappropriate. In Henriksen, the Illinois Racing Board originally suspended Henriksen, a trainer/driver, denying him privileges at the Illinois tracks, and subsequently suspended him a second time when it appeared that he drove horses during the initial suspension period at tracks in other states. The Court found the second suspension to be an improper extension of the Illinois Racing Board's jurisdiction in that the Illinois Board's second suspension attempted to regulate Henriksen's professional rights and privileges in other states. In our facts, the Kentucky Board is not seeking to restrict McKinney from any engineering activities in any other state, only Kentucky. While other states may choose to

discipline McKinney for his acts and omissions in their state, those decisions are solely up to them.

Aside from the discussion hereinabove, the Court of Appeals in its opinion (Judge Knopf's Concurring Opinion) on this subject, noted that since this same matter had been fully litigated between the same Parties in Earl F. McKinney v. Kentucky State Board of Registration for Professional Engineers and Land Surveyors, No. 93-CA-001561-MR (Not-to-be-Published Opinion rendered June 24, 1994) (copy attached at Appendix A), McKinney is precluded from re-litigating that matter.

III. REASONS WHY THE JUDGMENT SHOULD NOT BE REVIEWED

This Court's power to review a decision of the Court of Appeals is certainly a matter of judicial discretion, but Rule 76.20 provides that review will occur only when there are special reasons for it. Discretionary review is not intended to be simply an alternate form of appeal, but requires some issue which transcends McKinney's current plight.

McKinney's problems are parochial in nature, and that acceptance of this case will not serve to develop any legal principles that would have any general application to the legal system.

Unless the decision below is patently wrong and a manifest injustice would occur, the decision of the Court of Appeals should be left intact.

McKinney would have the Court believe that the decision in and the reasoning behind Barnhart entitle him to a different result than he has received in the Court of Appeals because most of his plan stamping work was on projects to be constructed out of state. McKinney's position conveniently ignores the fact that all of his actions with regard to those plans, occurred in Kentucky, and that some of those projects were for construction in Kentucky. His position

also ignores the findings of the other charges which clearly arise out of actions taken in Kentucky, and/or which constitute ethical misconduct, which violate other rules of the profession.

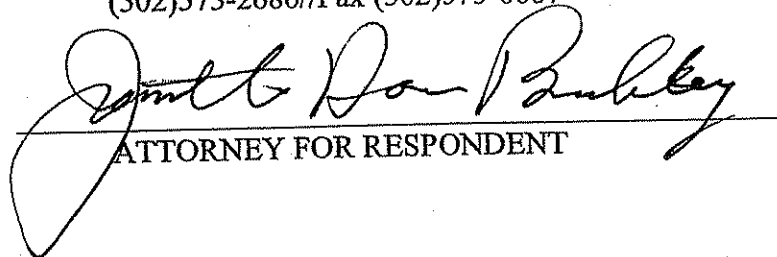
For the variety of reasons discussed hereinabove, Barnhart does not apply. Here, the Board seeks only to discipline acts which clearly fall within the statutory scheme, and with the exception of the ethical violation of the untruthful testimony in a Nevada disciplinary hearing, those acts all occurred within the boundaries of Kentucky. It is submitted that there is no issue to clarify.

CONCLUSION

Based on the foregoing, the Kentucky State Board of Licensure for Professional Engineers and Land Surveyors requests that the Motion for Discretionary Review be denied.

Respectfully submitted, on this the 30th day of August 2005.

JONATHAN DORAN BUCKLEY, GENERAL COUNSEL
KENTUCKY STATE BOARD OF LICENSURE FOR
PROFESSIONAL ENGINEERS & LAND SURVEYORS
160 Democrat Road, Frankfort, KY 40601
(502)573-2680//Fax (502)573-6687


ATTORNEY FOR RESPONDENT

RENDERED: June 24, 1994; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 93-CA-001561-MR

EARL F. MCKINNEY, P.E.

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER CRITTENDEN, JUDGE
ACTION NO. 93-CI-000426

KENTUCKY STATE BOARD OF REGISTRATION
FOR PROFESSIONAL ENGINEERS AND LAND
SURVEYORS

APPELLEE

OPINION
AFFIRMING and REMANDING

* * * * *

BEFORE: EMBERTON, HUDDLESTON and JOHNSTONE, Judges.

EMBERTON, JUDGE. This is an appeal from an order of the trial court denying a motion of the appellant, Earl F. McKinney, P.E., to enjoin the appellee, Kentucky State Board of Registration for Professional Engineers and Land Surveyors (The Board), from initiating a professional licensing disciplinary proceeding against him. KRS 322.180; KRS 322.010(3)(4).

The Supreme Court of Kentucky overruled an order from a panel of this court upholding the trial court's denial of a motion for interlocutory relief. In its ruling, that court granted the appellant's motion for a stay in the proceedings below -- pursuant to CR 76.33 -- and remanded the action to this court for "a hearing on the merits."

On appeal, the issues are (1) whether the Board lacks the statutory authority, as well as the subject matter jurisdiction, to discipline the appellant with respect to the alleged violations; and (2) if it has the requisite authority, does it violate the appellant's rights under the Privileges and Immunity clause of the United States Constitution. We affirm the order of the trial court and remand this action to it.

Here, the Board instituted a disciplinary complaint against the appellant for violations relating to his "practice of engineering." The appellant has an engineering license in this state as well as in forty-eight other states and the District of Columbia. The Board sought to revoke his license, alleging that he had practiced "plan stamping," or applying an engineer's signature and seal to a plan which was not prepared by him, or under his direct supervision or control without following specific rules for certifying such plans and designs.

In response, the appellant requested the Board's hearing officer to dismiss the complaint. That request was denied. As a result, he filed this action, seeking to enjoin the Board from proceeding with a disciplinary action against him.

The trial court denied his request for an injunction, ruling that the appellant had failed to demonstrate that he would suffer irreparable harm if the hearing were, in fact, held. After filing the required notice of appeal, the appellant sought interlocutory relief pursuant to CR 65.08. The request was denied by the trial court. A panel of this court denied his motion for interlocutory relief, ruling that the trial court did not abuse its discretion in denying his motion for a temporary injunction.

The appellant filed a CR 65.09 motion with the Supreme Court of Kentucky seeking to vacate the order of the Court of Appeals. At a hearing held before the Supreme Court, the Board conceded that the appellant would suffer irreparable harm if the disciplinary proceeding went forward and if it were subsequently determined that the Board lacked the requisite jurisdiction to discipline him.

In granting the appellant's motion for a stay, the Supreme Court noted, in apparent dicta, that:

. . . [T]he substantive legal arguments presented on behalf of the movant have sufficient validity so as to give rise to a reasonable possibility of success on appeal.

The court granted the stay and remanded the action to a panel of this court for a hearing on the merits.

Initially, the appellant argues that the Board lacks statutory authority, as well as subject matter jurisdiction, to initiate any discipline proceeding against him for allegedly violating the Board's own policies and procedures with respect to

engineering projects outside the state of Kentucky. In effect, he argues that under existing statutes, the Board had neither the power nor the authority to regulate his practice as to a project outside the state.

Conversely, the Board argues that under common statutory construction -- as well as grammatical construction of the statutes -- it had both the right and the obligation to regulate the appellant's professional activities even if it related to projects outside Kentucky. At the time this appeal was brought before the Supreme Court of Kentucky, all the existing charges against the appellant were dropped except those relating to violations of Sections 1, 7, and 9, of the Board's Code of Practice and Procedure.

As an administrative agency, the Board's power and jurisdiction are limited to that specifically granted to it by statute. Kerr v. Kentucky State Board of Registration for Professional Engineers and Land Surveyors, Ky. App., 797 S.W.2d 714 (1990). And, any exercise of authority by an administrative agency must be confined to the specific language of the statute. Curtis v. Belden Electronic Wire and Cable, Ky. App., 760 S.W.2d 97 (1988).

KRS 322.180 sets out the specific disciplinary authority granted to the Board. It provides, in part, that:

The board shall have the power to suspend, refuse to renew, or revoke the registration of any registrant, reprimand, place on probation, or fine not to exceed one thousand dollars (\$1,000), any registrant who is found guilty by the board of:

(2) Any gross negligence, incompetence or misconduct in the practice of engineering or surveying; [or]

(4) Violation of the code of professional practice and conduct which has been adopted by the board.

KRS 322.010(3)(4) defines both "engineering" and "the practice of engineering," as follows:

(3) "Engineering" includes any service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning and design of engineering works and systems, including engineering works and systems which involve earth materials, water, other liquids, and gases, planning the use of land and waters, and the review of construction for the purpose of assuring compliance with drawings and specifications; any of which embraces such service or work either public or private, in connection with any utilities, structures, certain buildings, building systems, machines, equipment, processes, work systems, or projects with which the public welfare of the safeguarding of life, health, or property is concerned, when such professional service requires the application of engineering principles and data. It does not include the work ordinarily performed by persons who operate or maintain machinery or equipment, such as locomotive, stationary, marine, or power plant operators, nor work embraced within the practice of land surveying.

(4) "Practice of engineering" includes all professional services included in subsection (3) of this section, together with the negotiation or solicitation for engineering work on any project in this state, regardless of whether the persons engaged in that practice are residents of this state or have their principal office or place of business in this state or any other state or country,

and regardless of whether they are performing one (1) or all of these duties, or whether they are performing them in person or as the directing heads of offices or organizations.

In construing the language of a statute, words are to be given their usual, ordinary, and everyday meaning. Gateway Construction Company v. Wallbaum, Ky., 356 S.W.2d 247 (1961). Here, the appellant argues that if the words in KRS 322.180 and KRS 322.010(3)(4) are to be given their usual, ordinary and everyday meanings, it is clear that the Board's authority is only over projects located within the state of Kentucky.

Specifically, he argues that the language contained in Section 4 of KRS 322.010 referring to "any project in this state. . ." limits the scope of the Board's authority to monitor engineering practices to these projects located within the state. Otherwise, he argues, the following language in Section 4, language referring to an engineer's residence, the location of his office as well as the performance of his engineering duties, would be superfluous. In effect, he argues that a court cannot construe a statute so as to lead to an absurd or unreasonable conclusion. Kentucky Mountain Coal Co. v. Witt, Ky., 358 S.W.2d 517 (1962).

In contrast, the Board maintains that Section 3 of KRS 322.010 is all inclusive and refers to any engineering project both within and without the state. Furthermore, it argues that the language of Section 4 referring to "any project in this state" limits the Board's regulatory power only in the area of solicitation or negotiation for engineering work to projects

located within this state. Consequently, it argues that it has the requisite jurisdiction over the appellant's activities in allegedly "plan stamping" prototype plans designed for projects in other states. We agree.

Clearly section (3) of KRS 322.010 is all-inclusive, defining "engineering" as "any service of creative work, " including the "planning and design of engineering works and systems." That section of the statute is not qualified or modified by the language, "any project in this state." Conversely, the language in section (4), as written and as constructed grammatically, clearly refers only to the negotiation or solicitation aspect of engineering work; any other type of engineering practice -- whether it involves a project within the state or outside it -- is clearly subject to the rules and regulations of the Board.

And the language following this language is not superfluous under this statutory construction: it simply states that if an engineer engages in either negotiation or solicitation for engineering work involving a project in this state, regardless of his or her place of residence or principal office, he or she is subject to the Board's authority and discipline.

Although the appellant argues that such a construction of KRS 322.020 would unduly burden his right to practice his profession, and, therefore, violate his rights under the Privileges and Immunities clause of the United States Constitution, we disagree.

States can exercise their police power in matters affecting the safety, welfare, comforts and conveniences of their citizens. Robbins v. Taxing Dist. of Shelby County, Tenn., 120 U.S. 489, 7 S.Ct. 592, 30 L.Ed. 694 (1887). And, states have the authority to regulate occupations and professions where the safety and welfare of the public are concerned. Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412, 57 S.Ct. 772, 81 L.Ed. 1193 (1937). Therefore, even if the appellant was approving only projects located outside the state, if such approval involved unsafe projects, Kentucky has an obligation to protect not only its citizens, but to prevent unsafe actions by its citizens, if such actions affect out-of-state citizens.

Accordingly, we hold that under the language of KRS 322.080 and KRS 322.010(3)(4), the Board has the authority to initiate a disciplinary action against the appellant for his practice of engineering as it related to projects outside the state of Kentucky. We affirm the circuit court order denying the motion for a permanent injunction, and remand this action to the circuit court with directions that it be dismissed.

JOHNSTONE, JUDGE, CONCURS.

HUDDLESTON, JUDGE, CONCURS BY SEPARATE OPINION.

HUDDLESTON, JUDGE, CONCURRING. I concur in the result reached by the Court. I write separately simply to give voice to the reasoning underlying my decision to affirm the circuit court.

The issue in this case is a simple one: Does a Kentucky regulatory board have the authority to regulate and

discipline a professional engineer who is licensed in this state and who maintains his office here where the work that he does impacts residents of other states, but not residents of Kentucky?

It has long been acknowledged in the criminal law that if one fires a bullet in Kentucky and kills or injures another across the border in a neighboring state, he can be prosecuted in either state. In the civil arena, an act which is done in one state, but which impacts those in another state is surely subject to regulation by both states.

Can it be seriously argued that a Kentucky testing laboratory which only examines substances from other states and, in turn, sends the results to the other states cannot be regulated in Kentucky? What about a Kentucky food processor or drug manufacturer whose entire output is shipped elsewhere? Is Kentucky precluded from regulating the activities of such a company? Common sense dictates that the answer in each case must be "No."

I agree with the Court and with the trial court that the Kentucky State Board of Registration for Professional Engineers and Land Surveyors may proceed against McKinney for a violation of its rules and regulations and may discipline him if he is found to have violated them.

ATTORNEY FOR APPELLANT:

Robert L. Abell
Lexington, Kentucky

ATTORNEY FOR APPELLEE:

B. R. Salyer
Morehead, Kentucky

Supreme Court of Kentucky

2005-SC-0583-D
(2003-CA-2555-MR)

EARL F. McKINNEY

MOVANT

V.

FRANKLIN CIRCUIT COURT
2002-CI-0905

KENTUCKY STATE BOARD OF REGISTRATION
FOR PROFESSIONAL ENGINEERS AND
LAND SURVEYORS

RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED: NOVEMBER 16, 2005.


CHIEF JUSTICE

RECEIVED

NOV 18 2005

KENTUCKY STATE
LICENSURE BOARD

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1 BEFORE THE STATE OF NEVADA
2 BOARD OF REGISTERED PROFESSIONAL ENGINEERS & LAND SURVEYORS
3

4 IN THE MATTER OF

5 EARL F. MCKINNEY,

6 A MECHANICAL ENGINEER,

7 REGISTRATION NUMBER 4436.
8
9

AMENDED
DECISION AND ORDER

10 The above matter came on regularly for hearing before the Nevada State
11 Board of Professional Engineers and Land Surveyors ("State Board") on Friday,
12 January 17, 1997, in Reno, Nevada. The State Board was represented by Bruce
13 Robb of the firm of Robison, Belaustegui, Robb & Sharp. Earl F. McKinney was
14 personally present and represented by William P. Curran, his Nevada counsel, and
15 Robert L. Abell; his Kentucky counsel. Witnesses having been sworn, testimony
16 heard, and evidence having been introduced, the matter was submitted to the
17 Board for decision, and the Board, after due consideration, did find and decide as
18 follows:
19

20 1. Earl F. McKinney is registered as a mechanical engineer in the State of
21 Nevada under registration number 4436.

22 2. In September, 1995, Mr. McKinney stamped and signed a set of
23 drawings for an 800 square foot food court mall Sbarro restaurant to be
24 constructed for Meadowood Mall in Reno, Nevada. The drawings stamped and
25 signed by Mr. McKinney included one (1) drawing (ME-1) for 200 amp electrical
26 service. Mr. McKinney is not licensed as an electrical engineer in the State of
27 Nevada.
28

EXHIBIT B

1 3. On November 20, 1995, the State Board received a complaint against
2 Mr. McKinney from the Community Development Department for the City of Reno.

3 4. On January 31, 1996, a formal disciplinary complaint was filed
4 against Mr. McKinney by Jerry Higgins, the Executive Director of the State Board,
5 requesting that Mr. McKinney's registration in the State of Nevada be suspended,
6 revoked or that he be otherwise disciplined.

7 5. On January 17, 1997, a formal disciplinary hearing was held on the
8 complaint. Individuals testifying at the disciplinary hearing were respondent Earl
9 F. McKinney, Michael R. Mitchell, chief building official for the City of Reno, and
10 Rick Gottschling, plans examiner for the City of Reno.

11 6. During the course of the hearing, Mr. Mitchell testified that the plans
12 were brought to his attention by his staff because the electrical drawings were
13 improperly stamped by Mr. McKinney rather than by a Nevada registered electrical
14 engineer.

15 7. During the course of the hearing, Mr. Gottschling testified that he
16 noticed that the electrical drawing was improperly stamped and informed Mr.
17 Mitchell of this fact. Mr. Gottschling further testified that he was concerned
18 because Mr. McKinney's signature covered and obscured the branch of discipline
19 on his stamp.

20 8. During the course of his testimony, Mr. McKinney admitted that he
21 improperly stamped and signed the one (1) plan involving electrical engineering and
22 that he should not have stamped or signed plans outside of his discipline of
23 mechanical engineering. Mr. McKinney further testified that his stamping error
24 was in part caused by the fact that he is registered as an Electrical Engineer in
25
26
27
28

1 numerous other states which do allow him to stamp electrical drawings and
2 because he had submitted electrical drawings for similar Sbarro restaurants in
3 many of these other states in the past.

4
5 9. The community Development Department of the City of Reno, without
6 notice to Mr. McKinney, issued building permits to a contractor using Mr.
7 McKinney's complete set of plans, including the electrical drawing without changes
8 or revisions.

9
10 10. Mr. McKinney was given no notice of possible violation or other
11 opportunity to rectify the erroneous submittal of the electrical plan (ME-1) prior to
12 the commencement of the disciplinary proceedings.

13
14 11. During the course of his testimony, Mr. McKinney testified that he
15 stamped the electrical drawing in the same manner as he stamped all of his
16 drawings. Mr. McKinney produced copies of plans which he had stamped in a
17 similar fashion prior to the date of the stamping of the Sbarro restaurant project.

18
19 12. Mr. McKinney candidly admitted that he improperly stamped and
20 signed the plan involving electrical engineering and that he should not have
21 stamped or signed plans outside of his discipline of mechanical engineering.

22
23 13. The evidence is undisputed that Mr. McKinney stamped and signed
24 one (1) electrical plan (ME-1) on the Meadowood Mall Sbarro restaurant project
25 that involved electrical engineering.

26
27 14. Mr. McKinney's conduct in stamping and signing plans outside of his
28 discipline is in violation of NRS 625.230(5) which provides as follows:

Each sheet of plans prepared in the course of the practice
of a particular discipline of professional engineering that
is submitted to a public agency must be stamped, dated

1 and signed by a professional engineer qualified to
2 practice in the discipline of professional engineering that
3 was involved in the preparation of that sheet.

4 15. Mr. McKinney's conduct in stamping and signing plans outside of his
5 discipline and submitting it to the City of Reno constitutes sufficient grounds for
6 the imposition of discipline by the State Board pursuant to NRS 625.410(5).

7 16. Mr. McKinney was previously disciplined by this Board on March 29,
8 1991, based upon discipline imposed upon Mr. McKinney by the Texas State
9 Board of Registration of Professional Engineers.

10 THEREFORE, ON MOTION DULY MADE, SECONDED AND UNANIMOUSLY
11 PASSED, IT IS HEREBY ORDERED that:
12

13 1. Mr. McKinney's license to practice mechanical engineering in the
14 State of Nevada is suspended for two years. The suspension is stayed.

15 2. Mr. McKinney is placed on probation for two years commencing on
16 March 15, 1997. Mr. McKinney's successful completion of his probation is
17 expressly conditioned upon his full compliance with the following conditions of
18 probation. If Mr. McKinney fails to comply with the terms of probation or with this
19 order, the Board may lift the stay, and Mr. McKinney's registration shall be
20 immediately suspended for two years from the date of the lifting of the stay:
21

22 a. Mr. McKinney shall comply with the standards of practice of
23 professional engineering in the State of Nevada.

24 b. Mr. McKinney shall submit quarterly reports to the Executive Director
25 of the Board setting forth the nature and scope of the work performed by him in
26 the State of Nevada during the term of his probation. The reports shall set forth in
27 detail the nature of the Nevada projects, all reference numbers assigned to the
28

1 projects by governmental entities, and all rejections by governmental entities
2 together with an explanation of the corrections required before governmental
3 entities approved the submittal.

4
5 The quarterly reports shall be submitted to the Executive Director of this
6 Board within fifteen days of the expiration of each quarter. Accordingly, the
7 reports must be received by the Executive Director on or before June 15,
8 September 15, December 15 and March 15 of each successive year. The first
9 quarterly report is due June 15, 1997.

10 c. The Board may order that Mr. McKinney's projects located in the
11 State of Nevada be reviewed by a mechanical engineer appointed for that purpose
12 by the Board. Cost of the reviews will be borne by Mr. McKinney.

13
14 3. Mr. McKinney is assessed the cost of these proceedings in the
15 amount of \$8,845.68 which shall be paid in monthly installments of \$1,000.00
16 commencing on July 1, 1997 and continuing on the 1st day of each successive
17 month until paid in full.

18
19 4. The imposition of the discipline set forth in this Decision does not limit
20 the powers of the State of Nevada Board of Registered Professional Engineers and
21 Land Surveyors to impose further discipline upon Mr. McKinney on matters not yet
22 presented to the Board, if any.

23 DATED: This 18 day of July, 1997.

24 STATE OF NEVADA BOARD OF REGISTERED
25 PROFESSIONAL ENGINEERS AND LAND SURVEYORS

26
27 BY: William R. Petty, P.E.
28 WILLIAM R. PETTY
CHAIRMAN

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BOARD OF REGISTERED PROFESSIONAL ENGINEERS AND LAND SURVEYORS

EARL F. MCKINNEY,

DECISION AND ORDER

I CERTIFY THIS TO BE A TRUE AND EXACT COPY OF THE ORIGINAL.

COMPLIANCE OFFICER

DATE

"It is therefore ordered that the engineering registration of Earl F. McKinney, Jr., P.E., number 41742 be, and hereby is, suspended for

ROBISON,
LAUSTEGUI,
B AND SHARP
PROFESSIONAL
CORPORATION
ATTORNEYS AT LAW
WASHINGTON ST.
NEVADA 89503
TELEPHONE
21 329-3151

EXHIBIT C

1 a period of three years, the suspension to be
2 probated for a term of three years, on
3 condition that any violations of the
4 Engineering Practice Act which have been
5 found in this contested case, if committed
6 again during the above term of years and
7 subsequent to the rendition of a final order
8 in this cause, will be grounds for revocation
9 of probation, at which time Respondent's
10 license may be fully suspended, and the
11 Respondent be prohibited from practicing
12 engineering in this State for the full period
13 initially assessed."

14 4. The Texas Board's action was based upon findings
15 that (1) Mr. McKinney affixed his signature on documents on which
16 he was not qualified to form a dependable judgment; (2) Mr.
17 McKinney performed acts which were fraudulent, deceitful or
18 misleading; (3) Mr. McKinney violated his duty to be personally
19 and professionally responsible for the care, custody, control and
20 use of his engineer seal; (4) Mr. McKinney was guilty of "plan
21 stamping" and contributed to the unauthorized practice of
22 engineering by unlicensed individuals; (5) Mr. McKinney violated
23 the Texas Engineering Practice Act's prohibition against the use
24 of signature reproductions; (6) Mr. McKinney failed to exercise
25 reasonable care to prevent his partners, associates and employees
26 from contact which violated the provisions of the Texas
27 Engineering Practice Act; and (7) Mr. McKinney engaged in conduct
28 that discredited or tended to discredit the profession of
engineering.

29 5. NRS 625.410(6) provides as follows:

30 "The board may take disciplinary action
31 against any registrant for any of the
32 following reasons:

33 Revocation or suspension of the registrant's
34 certificate or license to practice in any
35 other jurisdiction for any of the reasons

1 enumerated in this section."

2 6. The findings made by the Texas Board set forth
3 sufficient reasons for the imposition of discipline by this
4 Board.

5 THEREFORE, and motion duly made, seconded and passed by
6 unanimous vote, IT IS HEREBY ORDERED that:

7 1. Mr. McKinney is fined the sum of \$500.00 which sum
8 must be paid on or before May 15, 1991.

9 2. Mr. McKinney's registration as a mechanical
10 engineer in the State of Nevada is placed on probation for a
11 period equal to the probation imposed by the State of Texas.

12 3. During the period of probation, Mr. McKinney is to
13 advise the executive director of this Board in writing before
14 undertaking any project involving mechanical engineering in the
15 State of Nevada. The written notice to be provided to the
16 executive director shall set forth in great detail the following:

- 17 (a) The name of the client;
18 (b) The name of the project;
19 (c) The location of the project;
20 (d) The type and scope of the work involved;
21 (e) The size of the project; and
22 (f) The amount of the fee to be paid to Mr. McKinney.

23 4. Following receipt of the written notification from
24 Mr. McKinney, this Board may require that the engineering work to
25 be performed by Mr. McKinney be completed under the supervision
26 of an independent mechanical engineer selected by the Board. The
27 cost of such supervision shall be borne by Mr. McKinney.

28 5. Mr. McKinney's compliance with the terms of

1 probation imposed by the State of Texas and by this Board is a
2 condition precedent to his satisfactory completion of his
3 probation.

4 6. Any violation of the terms of this Order will
5 result in the prosecution of further disciplinary action against
6 Mr. McKinney which could result in the suspension or revocation
7 of his registration as a mechanical engineer in the State of
8 Nevada.

9 7. The imposition of the discipline set forth in this
10 decision does not limit the powers of the State of Nevada Board
11 of Registered Professional Engineers and Land Surveyors from
12 imposing further discipline upon Mr. McKinney on matters not yet
13 presented to the Board.

14 DATED: This 29th day of March, 1991.

15 STATE OF NEVADA BOARD OF
16 REGISTERED PROFESSIONAL
17 ENGINEERS AND LAND SURVEYORS

18 By George W. Ball, Jr.
19 GEORGE W. BALL, JR.
20 Chairman
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